REVISED CODES OF MONTANA

1947

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VOLUME FOUR
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1947

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AND PUBLISHED UNDER CHAPTER 43, LAWS OF 1947

I. W. Choate
Wesley W. Wertz
CODE COMMISSIONERS

REPLACEMENT VOLUME 4 PART 1

Notaries and Commissioners of Deeds to Public Health and Safety

Containing the Permanent Laws of the State in Force at the Close of the Thirty-seventh Legislative Assembly of 1961

Publishers

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PREFACE

The State of Montana continues to grow in its diversification of industries, in the assumption of new interests, cultural and business, by its expanding population. So indeed does its jurisprudence, both statutory and case law, develop to meet the changing times.

The original Volume Four of the 1947 REVISED CODES OF MONTANA was first replaced after the 1953 session of the Legislative Assembly. Since then over 400 pages of new laws, amendments and annotations have been compiled into the supplement for this volume, so that after the 1961 legislative session the supplement could no longer be inserted conveniently into the pocket provided in the binding of the parent volume.

For this reason and because of the substantial amounts of new and amendatory legislation in the fields of professional regulation, public health and safety, and school law, a new issue of Volume Four became essential under the replacement program approved by the State authorities and the Montana Bar Association. The 1962 edition of Replacement Volume Four has been published in two parts in order to provide books that are not too cumbersome and to permit supplementation for a longer period. Part 1 includes Titles 56 through 69 and Part 2 contains Titles 70 through 75.

The two books constituting Replacement Volume Four now contain all existing laws in the titles specified above, through the regular session of the Thirty-seventh Legislative Assembly, and all notes and annotations have been brought to date. Excluded are obsolete laws, local and special laws, appropriation acts, resolutions, and enacting and repealing clauses.

The arrangement and numbering system of the original volume have been retained; hence the General Index may be used as before in locating particular laws. Legislative history references have been brought to date and no changes have been made in the general style used heretofore.

Annotations have been added covering decisions of the Supreme Court of Montana and of the United States Supreme Court and other Federal courts through volume 137 Montana Reports, volume 369 Pacific 2d, volume 367 United States Reports, volume 6 Lawyers' Edition 2d, volume 81 Supreme Court Reporter, volume 298 Federal Reporter 2d, volume 201 Federal Supplement, volume 28 Federal Rules Decisions and volume 82 American Law Reports 2d.

To Wesley W. Wertz, Code Commissioner of the 1947 Codes, we extend our thanks for his advice and able assistance in the preparation of this Replacement.

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NOTARIES AND COMMISSIONERS OF DEEDS

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CHAPTER 1

NOTARIES PUBLIC

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56-102. Qualifications and residence.

56-103. Term of office.

56-104. Powers and duties.

56-105. Jurisdiction of notaries.

56-106. Authority of notaries who are stockholders or officers of corporations.

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56-114. Revocation of commission. 56-115. Certain acts made valid.

56-116. Limitations.

56-117. Acts of notaries validated.

56-101. (385) **Appointment and jurisdiction.** The governor may appoint and commission as many notaries public for the state of Montana as in his judgment may be deemed best, whose jurisdiction shall be co-extensive with the boundaries of the state, irrespective of their place of residence within the state.

History: En. Sec. 910, Pol. C. 1895; re-en. Sec. 317, Rev. C. 1907; amd. Sec. 1, Ch. 103, L. 1909; re-en. Sec. 385, R. C. M. 1921. Cal. Pol. C. Sec. 791.

References

Steinbrenner v. Elder, 80 M 395, 399, 260 P 725.

Collateral References

Notaries 2.

66 C.J.S. Notaries § 3 et seq. 39 Am. Jur. 211, Notary Public, generally; p. 215, §§ 8 et seq.

Liability of notary public or his bond. 18 ALR 1302 and 17 ALR 2d 948.

Liability of notary drawing invalid will to beneficiary named therein. 65 ALR 2d 1363.

56-102. (386) Qualifications and residence. Every person appointed as notary public must, at the time of his appointment, be a citizen of the United States and of the state of Montana for at least one year preceding his appointment, and must continue to reside within the state of Montana. Removal from the state vacates his office and is equivalent to resignation.

History: En. Sec. 911, Pol. C. 1895; Ch. 103, L. 1909; re-en. Sec. 386, R. C. M.-en. Sec. 318, Rev. C. 1907; amd. Sec. 2, 1921. Cal. Pol. C. Sec. 792. re-en. Sec. 318, Rev. C. 1907; amd. Sec. 2,

References

Steinbrenner v. Elder, 80 M 395, 399, 260 P 725.

Collateral References

Notaries © 2. 66 C.J.S. Notaries § 2.

56-103. (387) **Term of office.** The term of office of a notary public is three years from and after the date of his commission.

History: En. Sec. 912, Pol. C. 1895; re-en. Sec. 319, Rev. C. 1907; re-en. Sec. 387, R C. M. 1921. Cal. Pol. C. Sec. 793.

Collateral References

Notaries 2. 66 C.J.S. Notaries § 4. 39 Am. Jur. 216, Notary Public, § 13.

References

Steinbrenner v. Elder, 80 M 395, 399, 260 P 725.

56-104. (388) Powers and duties. It is the duty of a notary public:

- 1. When requested, to demand acceptance and payment of foreign, domestic, and inland bills of exchange, or promissory notes, and protest the same for nonacceptance or nonpayment, and to exercise such other powers and duties as by the law of nations and according to commercial usages, or by the laws of any other state, government, or country, may be performed by notaries, and keep a record of such acts.
- 2. To take the acknowledgment or proof of powers of attorneys, mortgages, deeds, grants, transfers, and other instruments of writing executed by any person, and to give a certificate of such proof or acknowledgment, endorsed or attached to the instrument.
- 3. To take depositions and affidavits, and administer oaths and affirmations, in all matters incident to the duties of the office, or to be used before any court, judge, officer, or board in this state.
- 4. When requested, and upon payment of his fees therefor, to make and give a certified copy of any record in his office.
- 5. To provide and keep an official seal, upon which must be engraved the name of the state of Montana, and the words, "Notarial Seal," with the surname of the notary, and at least the initials of his Christian name.
- 6. To authenticate with his official seal all official acts. In all cases when the notary public signs his name officially as a notary public, he must add to his signature the words, "Notary Public for the State of Montana, residing at ————" (stating the name of his post office), and must endorse upon the instrument the date of the expiration of his commission.

History: En. Sec. 913, Pol. C. 1895; re-en. Sec. 320, Rev. C. 1907; amd. Sec. 3, Ch. 103, L. 1909; re-en. Sec. 388, R. C. M. 1921. Cal. Pol. C. Sec. 794.

Cross-References

Fees, sec. 25-112. Notaries public as deputy registrars, sec. 23-505.

References

In re Stinger Estate, 61 M 173, 188, 201 P 693; Steinbrenner v. Elder, 80 M 395, 399, 260 P 725.

Collateral References

Notaries ←4. 66 C.J.S. Notaries § 6. 39 Am. Jur. 218, Notary Public, §§ 18 et seq.

Power of notary public to punish for contempt. 8 ALR 1543; 54 ALR 318 and 73 ALR 1185.

Power of notary public to take affidavit as basis for warrant of arrest. 16 ALR 924.

Sufficiency of certificate of acknowledgment. 29 ALR 919 and 25 ALR 2d 1124.

56-105. (389) Jurisdiction of notaries. Every person receiving a commission as notary public shall have jurisdiction to perform his official duties

and acts in every county of the state of Montana, and every notary now holding a commission from the governor of the state of Montana shall have like jurisdiction.

History: En. Sec. 4, Ch. 103, L. 1909; 66 C.J.S. Notaries § 6. re-en. Sec. 389, R. C. M. 1921. 39 Am. Jur. 218, Notary Public, § 17.

Collateral References

Notaries 24.

56-106. (390) Authority of notaries who are stockholders or officers of corporations. It shall be lawful for any notary public who is a stockholder, director, officer, or employee of a bank or other corporation, to take the acknowledgment of any party to any written instrument executed to or by such corporation, or to administer an oath to any other stockholder, director, officer, employee, or agent of such corporation, or to protest for nonaccceptance or nonpayment bills of exchange, drafts, checks, notes, and other negotiable instruments which may be owned or held for collection by such bank or other corporation; provided, it shall be unlawful for any notary public to take the acknowledgment of an instrument by or to a bank or other corporation of which he is a stockholder, director, officer, or employee, where such notary is a party to such instrument, either individually or as a representative of such bank or other corporation, or to protest any negotiable instrument owned or held for collection by such bank or other corporation, where such notary is individually a party to such instrument.

History: En. Sec. 1, Ch. 77, L. 1909; re-en. Sec. 390, R. C. M. 1921.

Collateral References
Notaries 4.
66 C.J.S. Notaries § 6.

56-107. (391) Protests, evidence of facts stated. The protest of a notary under his hand and official seal, of a bill of exchange or promissory note, for nonacceptance or nonpayment, stating the presentment for acceptance or payment, and the nonacceptance or nonpayment thereof, the service of notice on any or all of the parties to such bill of exchange or promissory note and specifying the mode of giving such notice, and the reputed place of residence of the party to such bill of exchange or promissory note, and of the party to whom the same was given, and the post office nearest thereto, is prima-facie evidence of the facts contained therein.

History: En. Sec. 914, Pol. C. 1895; re-en. Sec. 321, Rev. C. 1907; re-en. Sec. 391, R. C. M. 1921. Cal. Pol. C. Sec. 795.

Collateral References
Bills and Notes 410.
11 C.J.S. Bills and Notes 677.

56-108. (392) Records of, on death or resignation. It is the duty of every notary public, on his resignation or removal from office, and in case of his death, of his legal representative, or at the expiration of his term, to forthwith deposit all the records kept by him in the office of the county clerk of the county in which he was resident, and on failure to do so, the person so offending is liable to damages to any person injured thereby.

History: En. Sec. 915, Pol. C. 1895; re-en. Sec. 322, Rev. C. 1907; re-en. Sec. 392, R. C. M. 1921. Cal. Pol. C. Sec. 796.

56-109. (393) Certified copies of records. It is the duty of each clerk aforesaid to receive and safely keep all such records and papers of the

notary in the case above named, and to give attested copies of them under his seal, for which he may demand such fees as by law may be allowed to the notaries, and such copies shall have the same effect as if certified by the notary.

History: En. Sec. 916, Pol. C. 1895; re-en. Sec. 323, Rev. C. 1907; re-en. Sec. 393, R. C. M. 1921. Cal. Pol. C. Sec. 797.

56-110. (394) Bond and commission of notary public. Each notary public must give an official bond in the sum of one thousand dollars, which bond must be approved by the secretary of state. Upon the approval of said bond and the filing in the office of the secretary of state of the official oath of such notary public, the governor shall issue a commission.

History: En. Secs. 324-325, Rev. C. 1907; amd. Sec. 5, Ch. 103, L. 1909; amd. Sec. 1, Ch. 7, L. 1921; re-en. Sec. 394, R. C. M. 1921. Cal. Pol. C. Sec. 799.

Collateral References

Notaries©⊃2. 66 C.J.S. Notaries § 3. 39 Am. Jur. 216, Notary Public, § 11.

56-111. (395) **Liabilities on official bond.** For the official misconduct or neglect of a notary public, he and the sureties on his official bond are liable to the parties injured thereby for all damages sustained.

History: En. Sec. 919, Pol. C. 1895; re-en. Sec. 326, Rev. C. 1907; re-en. Sec. 395, R. C. M. 1921. Cal. Pol. C. Sec. 801.

References

Steinbrenner v. Elder, 80 M 395, 399, 260 P 725.

What Constitutes a Cause of Action

Sureties are liable for injury which results proximately from the official misconduct or neglect of the notary, but in order to constitute a cause of action someone must have parted with value in reliance upon the verity of the certificate of the notary, when a fraudulent acknowledgment is alleged. Ellis v. Hale, 58 M 181, 186, 194 P 155.

Collateral References

Notaries € 11. 66 C.J.S. Notaries § 12.

Liability of notary public or his bond. 18 ALR 1302 and 17 ALR 2d 948.

Liability of notary drawing invalid will to beneficiary named therein. 65 ALR 2d 1363.

56-112. (396) Certificates of official character. The secretary of state may certify to the official character of such notary public, and any notary public may file a copy of his commission in the office of any county clerk of any county in the state, and thereafter said county clerk may certify to the official character of such notary public.

History: En. Sec. 2, p. 101, L. 1885; re-en. Sec. 1569, 5th Div. Comp. Stat. 1887; re-en. Sec. 920, Pol. C. 1895; re-en. Sec. 327, Rev. C. 1907; amd. Sec. 6, Ch. 103, L. 1909; re-en. Sec. 396, R. C. M. 1921.

Collateral References

Notaries 2. 66 C.J.S. Notaries §§ 3, 6 et seq.

56-113. (397) Fees for filing commission and issuing certificates. The secretary of state shall receive for each certificate of official character issued, with seal attached, the sum of two dollars (\$2.00). The county clerk of any county in this state with whom a copy of notarial commission has been filed, shall receive for filing same the sum of fifty cents, and for each certificate of official character issued, with seal attached, the further sum of fifty cents.

History: En. Sec. 3, p. 101, L. 1885; 1887; re-en. Sec. 921, Pol. C. 1895; re-en. re-en. Sec. 1570, 5th Div. Comp. Stat. Sec. 328, Rev. C. 1907; amd. Sec. 7, Ch.

103, L. 1909; re-en. Sec. 397, R. C. M. 1921; amd. Sec. 12, Ch. 117, L. 1961.

Collateral References Notaries € 2. 66 C.J.S. Notaries § 14.

56-114. (398) **Revocation of commission.** Upon ten days' notice, the governor may revoke the commission of any notary public for any cause he may deem sufficient.

History: En. Sec. 922, Pol. C. 1895; re-en. Sec. 329, Rev. C. 1907; re-en. Sec. 398, R. C. M. 1921.

Collateral References Notaries 2. 66 C.J.S. Notaries § 4. 39 Am. Jur. 217, Notary Public, § 14.

56-115. (399) **Certain acts made valid.** The official acts of every person acting as a notary public within the state of Montana, and heretofore commissioned as such, which acts have been performed since the eighth day of November, A. D. 1889, and up to and including the date of the passage of this act, so far as such acts might be affected, impaired, or questioned by reason of change of residence made after appointment, misnomer, or misspelling of name, or other error made in the appointment or commission of such notary public, neglect to take the prescribed oath of office, the minority of such person, or the expiration of his term of office, are hereby legalized and confirmed, and made effectual and valid.

History: En. Sec. 1, p. 65, L. 1893; 330, Rev. C. 1907; re-en. Sec. 399, R. C. M. re-en. Sec. 923, Pol. C. 1895; re-en. Sec. 1921.

56-116. (400) **Limitations.** Nothing in this act contained shall affect any legal action or proceeding now pending.

History: En. Sec. 924, Pol. C. 1895; re-en. Sec. 331, Rev. C. 1907; re-en. Sec. 400, R. C. M. 1921.

Collateral References Notaries 6. 66 C.J.S. Notaries § 6 et seq.

56-117. (401) **Acts of notaries validated.** The official acts of every person acting as a notary public within the state of Montana, heretofore commissioned as such, which acts have been performed since the 15th day of February, 1895, and up to and including the date of the passage of this act, so far as such acts might be affected, impaired, or questioned by reason of change of residence made after appointment, misnomer, or misspelling of name, or other error made in the appointment or commission of such notary, neglect to take the prescribed oath of office, failure of the notary to place his seal upon any instrument, the minority of such person, or the expiration of his term of office, are hereby legalized and confirmed and made effectual and valid.

History: En. Sec. 1, Ch. 49, L. 1907; Sec. 332, Rev. C. 1907; re-en. Sec. 401, R. C. M. 1921.

CHAPTER 2

COMMISSIONERS OF DEEDS

Section 56-201. Governor to appoint. 56-202. General duties of.

56-203. Effect of acts done by commissioners.

Oaths, when to be filed. 56-204.

56-205. Fees.

56-206. Copy of this chapter to be transmitted to appointee.56-207. Fee to be paid into state treasury.

56-201. (402) Governor to appoint. The governor may appoint in each state of the United States, or in any foreign state, one or more commissioners of deeds, to hold office for the term of five years from and after the date of their commission, but the governor may remove from office any commissioner during the term for which he was appointed.

History: En. Sec. 940, Pol. C. 1895; re-en. Sec. 333, Rev. C. 1907; re-en. Sec. 402, R. C. M. 1921, Cal. Pol. C. Secs. 811-817.

Collateral References

Acknowledgment \$\infty 17, 18.
1 C.J.S. Acknowledgments \\$\ 49, 50.

56-202. (403) **General duties of.** Every commissioner of deeds has power, within the state for which he was appointed:

- 1. To administer and certify oaths.
- 2. To take and certify depositions and affidavits.
- 3. To take and certify the acknowledgment of proof of powers of attorney, mortgages, transfers, grants, deeds, or other instruments for record.
- 4. To provide and keep an official seal, upon which must be engraved his name, the words "Commissioner of Deeds for the State of Montana," and the name of the state for which he is commissioned.
 - 5. To authenticate with his official seal all his official acts.

History: En. Sec. 941, Pol. C. 1895; re-en. Sec. 334, Rev. C. 1907; re-en. Sec. 403, R. C. M. 1921.

Collateral References Acknowledgment €= 15-19. 1 C.J.S. Acknowledgments §§ 44-51.

Cross-Reference

Acknowledgments, power to take, secs. 39-103, 56-104.

56-203. (404) Effect of acts done by commissioners. All oaths administered, depositions and affidavits taken, and all acknowledgments and proofs certified by commissioners of deeds, have the same force and effect, to all intents and purposes, as if done and certified in this state by any officer authorized by law to perform such acts.

History: En. Sec. 942, Pol. C. 1895; re-en. Sec. 335, Rev. C. 1907; re-en. Sec. 404, R. C. M. 1921.

Collateral References

56-204. (405) **Oaths, when to be filed.** The official oaths of commissioners of deeds, together with the impressions of their official seals, must be filed in the office of the secretary of state within six months after they are taken.

History: En. Sec. 943, Pol. C. 1895; re-en. Sec. 336, Rev. C. 1907; re-en. Sec. 405, R. C. M. 1921.

Collateral References States \$\infty 48. 81 C.J.S. States \\$ 76.

56-205. (406) **Fees.** The fees of commissioners of deeds are the same as those prescribed for notaries public.

History: En. Sec. 944, Pol. C. 1895; re-en. Sec. 337, Rev. C. 1907; re-en. Sec. 406, R. C. M. 1921.

Collateral References States \$\infty\$=60. 81 C.J.S. States § 89.

Cross-Reference

Fees, sec. 25-112.

56-206. (407) Copy of this chapter to be transmitted to appointee. The secretary of state must transmit, with the commission to the appointee, a certified copy of this chapter, and of the section prescribing the fees of notaries public.

History: En. Sec. 945, Pol. C. 1895; re-en. Sec. 338, Rev. C. 1907; re-en. Sec. 407, R. C. M. 1921.

Collateral References States 73. 81 C.J.S. States § 64.

56-207. (408) **Fee to be paid into state treasury.** No commission must issue until the applicant pays into the state treasury the sum of five dollars.

History: En. Sec. 946, Pol. C. 1895; re-en. Sec. 339, Rev. C. 1907; re-en. Sec. 408, R. C. M. 1921.

Collateral References States \$\infty 48. 81 C.J.S. States § 76.

TITLE 57

NUISANCES

Chapter 1. Nuisances public and private—remedies, 57-101 to 57-115.

CHAPTER 1

NUISANCES PUBLIC AND PRIVATE—REMEDIES

Section 57-101. Nuisance defined. 57-102. Public nuisance.

57-102. Public nuisance. 57-103. Private nuisance.

57-104. What is not deemed a nuisance.

57-105. Successive owners.

57-106. Abatement does not preclude action.

57-107. Lapse of time does not legalize.

57-108. Abatement.

57-109. How regulated.

57-110. Action for public nuisance, when private person may maintain.

57-111. Public nuisance—how abated.

57-112. How abated by persons.

57-113. Remedies for private nuisance.

57-114. Abatement—when allowed.

57-115. When notice is required.

57-101. (8642) Nuisance defined. Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway is a nuisance.

History: En. Sec. 4550, Civ. C. 1895; re-en. Sec. 6162, Rev. C. 1907; re-en. Sec. 8642, R. C. M. 1921. Cal. Civ. C. Sec. 3479.

Adverse Possession—Prescriptive Right Limited by Enjoyment—Water

Adverse possession and exercise of the right of diverting water for the statutory period is sufficient to raise a presumption of a grant, and to defeat an action for an injunction against a private nuisance; the extent of the prescriptive right, however, must be limited by the actual enjoyment, and must be commensurate with that enjoyment. Gibbs v. Gardner, 107 M 76, 82, 80 P 2d 370.

Construction

This section must be given a commonsense construction so as not to suppress a legitimate business on account of some imaginary or trifling annoyance which offends the supersensitive nerves of a fastidious person, but, on the other hand a home owner may not be compelled to live

in positive discomfort so as to accommodate another in pursuit of a business offensive to the mind and taste of the average individual. Purcell v. Davis, 100 M 480, 493, 50 P 2d 255.

Defense in General

Where mining operations constitute a nuisance, it is no defense that they were carried on according to approved methods, that due care was exercised, or that mining is necessary to the industrial life of the particular district. Cavanaugh v. Corbin Copper Co., 55 M 173, 179, 174 P 184.

Grant of Power as a Defense to a Nuisance

In grants of authority to municipal corporations, authority to commit a nuisance will not be implied but must be expressed, since in the use of their private property they are subject to the same rules as private individuals, and when the use and enjoyment of a legislative grant does not necessarily and naturally create a nuisance,

but the nuisance results from the method of the use and enjoyment, the grant constitutes no defense. Lennon v. City of Butte, 67 M 101, 105, 214 P 1101.

Nature of Proof Required-Injunction

In seeking to enjoin erection of oil refinery in residential section because inter alia of anticipated reduction in market value of nearby property, plaintiff must show injury is practically certain, not merely probable, and that it cannot be compensated by damages in an action at law. Purcell v. Davis, 100 M 480, 494, 50 P 2d 255.

Sale of Intoxicating Liquor Not Nuisance in Itself

The sale of intoxicating liquor is not made a nuisance by the general definition of that term contained in this section. State ex rel. Nagle v. Naughton, 103 M 306, 319, 63 P 2d 123.

Sufficiency of Complaint Stating Cause of Action for Nuisance

Sufficiency of a complaint against a city, as stating a cause of action for the recovery of damages for maintaining a sewer in such a manner as to be a nuisance and to injure the plaintiff. Murray v. City of Butte, 35 M 161, 170, 88 P 789. A complaint in an action to enjoin the

A complaint in an action to enjoin the maintenance and operation of a storage reservoir, authorized by law and under section 57-104, used for generating electric power, on the ground that it constituted a nuisance by flooding plaintiff's property, did not state a cause of action in the absence of an allegation of negligence. Jeffers v. Montana Power Co., 68 M 114, 137, 217 P 652.

Unlicensed Photographers

The taking of pictures either with or without a license not being a nuisance an injunction could not be obtained to enjoin the activities of unlicensed photographers. Montana State Board of Examiners v. Keller, 120 M 364, 185 P 2d 503, 506.

What Constitutes a Nuisance

The use of water by an upper appropriator in such a way as to carry sand, gravel, and mining debris over the land of a lower proprietor, so as to render it valueless, constitutes a nuisance, both at common law and under this section. Chessman v. Hale, 31 M 577, 584, 79 P 254, distinguished in 70 M 333, 335, 225 P 802.

The conduct of members of a labor union and their sympathizers, in congregating in large numbers in the immediate vicinity of the property of a person in a city, who is deemed unfair to organized labor, and in impeding travel on the sidewalk in front of such property, and in interfering with the business there carried on, and with the customers at such place, constitutes a nuisance, a continuation of which equity will prevent by injunction. Iverson v. Dilno, 44 M 270, 273, 119 P 719.

In a suit to enjoin labor unions from conducting a peaceable boycott against plaintiff's theater, by picketing men carrying banners in front of the door of the theater and dissuading patrons from entering, and in warning the public and those in sympathy with the unions that plaintiff was unfair to organized labor, a writ of injunction will not issue on the ground that the acts complained of constitute a nuisance within the meaning of this section. Empire Theater Co. v. Cloke, 53 M 183, 195, 163 P 107.

Where a railroad company allowed the carcass of a horse killed by one of its trains to remain on its right of way near a railroad crossing, emitting offensive odors, the company is liable, under this section and section 57-102, for damages occasioned by the nuisance, including the frightening of passing teams. Great Northern Ry. Co. v. Ennis, 236 Fed 17, 21.

References

State ex rel. Ford v. Young, 54 M 401, 402, 170 P 947; State ex rel. Bourquin v. Morris, 67 M 40, 43, 214 P 332; State ex rel. Lamey v. Young, 72 M 408, 416, 234 P 248; City of Bozeman v. Merrell, 81 M 19, 29, 261 P 876; Faucett v. Dewey Lumber Co., 82 M 250, 258, 266 P 646; McCollum v. Kolokotrones, 131 M 438, 311 P 2d 780, 782.

Collateral References

Nuisance 1 et seq., 59 et seq. 66 C.J.S. Nuisances §§ 1, 8 et seq. 39 Am. Jur. 280, Nuisances, § 2.

Effect of delay in seeking equitable relief against nuisance. 6 ALR 1098.

Right to enjoin threatened or anticipated nuisance. 7 ALR 749; 26 ALR 937; 32 ALR 724 and 55 ALR 880.

Power to declare pool and billiard room and bowling alley a nuisance per se, and right to enjoin their operations. 20 ALR 1482; 29 ALR 41; 53 ALR 149 and 72 ALR 1339.

Amusement park as a nuisance. 33 ALR 725.

Attracting people in such numbers as to obstruct access to the neighboring premises, as nuisance. 2 ALR 2d 437.

Casting light on another's premises in connection with sporting events or amusements as a nuisance. 5 ALR 2d 707, 708.

Coalyard as nuisance. 8 ALR 2d 419. Animal rendering or bone-boiling plant or business as nuisance. 17 ALR 2d 1269.

Dogs, birds, or other pets, keeping by tenant as a nuisance. 18 ALR 2d 880.

Stockyard as a nuisance. 18 ALR 2d 1033.

Dust as nuisance. 24 ALR 2d 194.

Tourist or trailer camps, motor courts or motels as nuisances. 24 ALR 2d 571.

Private school as nuisance. 27 ALR 2d 1249.

Pollution of subterranean waters as nuisance. 38 ALR 2d 1285.

Undertaking establishment as nuisance. 39 ALR 2d 1000.

Sewage disposal plant as nuisance. 40 ALR 2d 1177.

Public dances or dance halls as nui-

sances. 44 ALR 2d 1397.

Quarries, gravel pits, and the like as nuisances. 47 ALR 2d 490.

Cemetery or burial grounds as nuisance. 50 ALR 2d 1324.

Use of "spot zoned" property as nuisance. 51 ALR 2d 280.

Public dump as nuisance. 52 ALR 2d 1134.

Fishing, boating, bathing or the like in inland lake as nuisance. 57 ALR 2d 594.

Golf course or driving range as a nuisance. 68 ALR 2d 1331.

Cats, possession of, or manner of keeping as nuisance. 73 ALR 2d 1040.

Merry-go-round as nuisance. 75 ALR 2d

803. Water sports, amusements, or exhibitions as nuisance. 80 ALR 2d 1124.

57-102. (8643) **Public nuisance**. A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

History: En. Sec. 4551, Civ. C. 1895; re-en. Sec. 6163, Rev. C. 1907; re-en. Sec. 8643, R. C. M. 1921. Cal. Civ. C. Sec. 3480. Based on Field Civ. C. Sec. 1950.

Bawdyhouse

A bawdyhouse is a public nuisance under this section. State ex rel. Ford v. Young, 54 M 401, 404, 170 P 947, explained in 129 M 106, 113, 283 P 2d 594.

Chicken Raising Business

Chicken raising business was not a public nuisance. McCollum v. Kolokotrones, 131 M 438, 311 P 2d 780, 782.

Obstructing Streets

Under the rule that a private person may maintain an action to abate a public nuisance if the nuisance causes special or peculiar injury to him, substantial in its nature, complaint by owners of residential property on streets facing a lake, against a lumber company which had caused to be piled large quantities of lumber across the street ends and along the lake front between high and low watermark, thus cutting off access to the lake, alleging that defendant's acts made their property less desirable and less valuable for residential purposes, prevented them from reaching the water's edge, etc., stated a cause of action. Faucett v. Dewey Lumber Co., 82 M 250, 259, 266 P 646.

Possession of Intoxicating Liquor

The possession of a pint of moonshine

liquor by defendant in his dwelling house did not constitute a public nuisance where no proof was made showing a single sale or attempted sale; the liquor was discovered by a search of the premises made without information that it was there; and possession of such a small amount of liquor could not endanger the public health, safety, peace or comfort of the whole community or a considerable number of people. City of Bozeman v. Merrell, 81 M 19, 29, 261 P 876.

What Constitutes a Public Nuisance

Under this section, a public nuisance is one which affects an entire neighborhood or community or any considerable number of persons. City of Bozeman v. Merrell, 81 M 19, 29, 261 P 876.

When Public or Private

A nuisance is common or public where it affects rights to which every citizen is entitled; it is private where it affects a single individual or a determinate number of persons in the enjoyment of some private right not common to the public. Gibbs v. Gardner, 107 M 76, 81, 80 P 2d 370.

References

State ex rel. Harrison v. Deniff, 126 M 109, 245 P 2d 140; Great Northern Ry. Co. v. Ennis, 236 Fed 17, 21.

Collateral References

39 Am. Jur. 284, Nuisances, §§ 7-10.

57-103. (8644) **Private nuisance.** definition of the last section is private.

History: En. Sec. 4552, Civ. C. 1895; re-en. Sec. 6164, Rev. C. 1907; re-en. Sec. Every nuisance not included in the

8644, R. C. M. 1921. Cal. Civ. C. Sec. 3481. Field Civ. C. Sec. 1951.

When Public or Private

A nuisance is common or public where it affects rights to which every citizen is entitled; it is private where it affects a single individual or a determinate number of persons in the enjoyment of some private right not common to the public. Gibbs v. Gardner, 107 M 76, 81, 80 P 2d 370.

References

City of Bozeman v. Merrell, 81 M 19, 29, 261 P 876; Faucett v. Dewey Lumber Co., 82 M 250, 259, 266 P 646.

57-104. (8645) What is not deemed a nuisance. Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.

History: En. Sec. 4553, Civ. C. 1895; re-en. Sec. 6165, Rev. C. 1907; re-en. Sec. 8645, R. C. M. 1921. Cal. Civ. C. Sec. 3482. Field Civ. C. Sec. 1952.

Gambling

Premises wherein punch boards are operated may be abated as a nuisance inasmuch as it constitutes gambling, and sections 84-5701, 84-5702 (since repealed) and 94-2401 which assume to authorize the use of punch boards as "trade stimulators," violate section 2 of Article XIX of the Montana Constitution and therefore are invalid and do not prevent the abatement of the premises as a nuisance. State ex rel. Harrison v. Deniff, 126 M 109, 245 P 2d 140, 141.

Use and Enjoyment of Grant

In grants of authority to municipal corporations, authority to commit a nuisance will not be implied but must be expressed, since in the use of their private property they are subject to the same rules as private individuals, and when the use and enjoyment of a legislative grant does not necessarily and naturally create a nuisance, but the nuisance results from the method of the use and enjoyment, the grant constitutes no defense. Lennon v. City of Butte, 67 M 101, 106, 214 P 1101.

Waters and Watercourses

A complaint to enjoin the maintenance and operation of a storage reservoir used for generating electric power, on the ground that it constituted a nuisance during the winter months when water was released for power development purposes causing an unnatural fluctuation of several feet in the level of the river below which caused ice to break and jam flooding plaintiff's property, did not state a cause of action in the absence of an allegation of negligence, the operation of the reservoir being authorized by law. Jeffers v. Montana Power Co., 68 M 114, 139, 217 P 652.

There can be no question but that the irrigation company was expressly authorized to construct and maintain the embankment and grade for the canal by section 15 of Article III of the Constitution, and section 89-820, in effect since 1895, and "nothing which is done or maintained under express authority of a statute can be deemed a nuisance." Gray v. Cove Irr. Dist., 86 M 562, 566, 284 P 539; Peel v. Chicago, M., St. P. & P. R. Co., 94 M 334, 340, 22 P 2d 617.

Since a railroad company is authorized by law to maintain embankments across waterways, and nothing maintained under authority of law can be deemed a nuisance (this section), an embankment constructed and maintained so as not to constitute a nuisance per se may not be held to have been negligently constructed. Heckaman v. Northern Pacific Ry. Co., 93 M 363, 377, 20 P 2d 258.

Collateral References

Nuisance 5, 6, 64, 65. 66 C.J.S. Nuisances §§ 9, 17 et seq.

57-105. (8646) Successive owners. Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by a former owner, is liable therefor in the same manner as the one who first created it.

History: En. Sec. 4554, Civ. C. 1895; re-en. Sec. 6166, Rev. C. 1907; re-en. Sec. 8646, R. C. M. 1921. Cal. Civ. C. Sec. 3483. Field Civ. C. Sec. 1953.

Notice

It is not necessary to give notice to one who continues a nuisance to abate it before bringing a suit for damages arising therefrom. Watson v. Colusa-Parrot M. & S. Co., 31 M 513, 524, 79 P 14.

Nuisance Created by Structure

This section is limited to nuisances which are created by erection of a structure and which may be termed nuisances per se, and does not comprehend a nuisance arising because of manner of using property or a structure whose mere creation did not constitute a nuisance. Midland Empire Packing Co. v. Yale Oil Corp., 119 M 36, 169 P 2d 732, 734.

Oil Refinery

An oil refinery is not harmful per se, whether it is a nuisance in a given case depending upon how it is operated, and hence former owner and operator of oil refinery was not liable for damage to adjacent slaughterhouse premises after sale of refinery to another company, though similar injury to slaughterhouse occurred

while refinery was under operation of former owner. Midland Empire Packing Co. v. Yale Oil Corp., 119 M 36, 169 P 2d 732, 734.

Collateral References

Nuisance 10, 70. 66 C.J.S. Nuisances § 85 et seq.

57-106. (8647) Abatement does not preclude action. The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence.

History: En. Sec. 4555, Civ. C. 1895; re-en. Sec. 6167, Rev. C. 1907; re-en. Sec. 8647, R. C. M. 1921. Cal. Civ. C. Sec. 3484. Field Civ. C. Sec. 1954.

Action against City

Where a city maintained a private nuisance which a party abated at his own expense, he might recover from the city such damages as he sustained by reason of the maintenance of such nuisance, and could recover the necessary expense in

abating it as an element of such damages. Murray v. City of Butte, 35 M 161, 168, 88 P 789.

References

Chessman v. Hale, 31 M 577, 587, 79 P 254.

Collateral References

Nuisance 41-43. 66 C.J.S. Nuisances § 139.

57-107. (8648) Lapse of time does not legalize. No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right.

History: En. Sec. 4570, Civ. C. 1895; re-en. Sec. 6168, Rev. C. 1907; re-en. Sec. 8648, R. C. M. 1921. Cal. Civ. C. Sec. 3490. Field Civ. C. Sec. 1955.

Collateral References

Nuisance 11-17, 66, 73. 66 C.J.S. Nuisances §§ 91, 92.

57-108. (8649) Abatement. The remedies against a public nuisance are:

- 1. Indictment or information;
- 2. A civil action; or,
- 3. Abatement.

History: En. Sec. 4571, Civ. C. 1895; re-en. Sec. 6169, Rev. C. 1907; re-en. Sec. 8649, R. C. M. 1921. Cal. Civ. C. Sec. 3491. Based on Field Civ. C. Sec. 1956.

Operation and Effect

The attorney general has power, by injunction, to obtain the suppression of a bawdyhouse as a nuisance. State ex rel. Ford v. Young, 54 M 401, 404, 170 P 947, explained in 129 M 106, 113, 283 P 2d 594.

Collateral References

39 Am. Jur. 371, Nuisances, §§ 117 et seq.

Constitutionality of statutes conferring on chancery courts power to abate public

nuisances. 5 ALR 1474; 22 ALR 542 and 75 ALR 1298.

Effect of delay in seeking equitable relief against nuisance. 6 ALR 1098.

Right to enjoin threatened or anticipated nuisance. 7 ALR 749; 26 ALR 937; 32 ALR 724 and 55 ALR 880.

Necessity of knowledge by owner of real estate of a nuisance maintained thereon by another to subject him to the operation of a statute providing for the abatement of nuisances, or prescribing a pecuniary penalty therefor. 12 ALR 431 and 121 ALR 642.

57-109. (8650) **How regulated.** The remedy by indictment or information is regulated by Title 94.

History: En. Sec. 4572, Civ. C. 1895; re-en. Sec. 6170, Rev. C. 1907; re-en. Sec. 8650, R. C. M. 1921. Cal. Civ. C. Sec. 3492.

Collateral References

Nuisance 89 et seq. 66 C.J.S. Nuisances § 159 et seq.

57-110. (8651) Action for public nuisance, when private person may maintain. A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise.

History: En. Sec. 4573, Civ. C. 1895; re-en. Sec. 6171, Rev. C. 1907; re-en. Sec. 8651, R. C. M. 1921. Cal. Civ. C. Sec. 3493. Field Civ. C. Sec. 1958.

Chicken Raising Business

Where defendants kept their property clean and conducted the chicken raising enterprise in a reasonable and proper manner; none of the structures or the chickens, nor the manner of use thereof, had damaged the plaintiff or the neighborhood, and the structures did not constitute a fire hazard, there was no existence of a nuisance or damages resulting therefrom. McCollum v. Kolokotrones, 131 M 438, 311 P 2d 780, 783.

Obstructing Streets

Under the rule that a private person may maintain an action to abate a public nuisance if the nuisance causes special or peculiar injury to him, substantial in its nature, complaint by owners of residential property on streets facing a lake, against a lumber company which had caused to be piled large quantities of lumber across the street ends and along the lake front between high and low watermark, thus cutting off access to the lake, alleging that defendant's acts made their property less desirable and less valuable for residential

purposes, prevented them from reaching the water's edge, etc., stated a cause of action. Faucett v. Dewey Lumber Co., 82 M 250, 259, 266 P 646.

Operation and Effect

Since a private person may maintain an action for a public nuisance if it is specially injurious to himself, according to the provisions of this section, the fact that the conduct of defendants constituted a public nuisance did not defeat plaintiff's right to relief by injunction. Iverson v. Dilno, 44 M 270, 276, 119 P 719.

Special Damage

Where owner of tourist camp sought to have chicken raising business on nearby property declared a public nuisance and abated, it was incumbent upon the plaintiff to prove special damage, in other words, damage distinct from that unto the public at large. McCollum v. Kolokotrones, 131 M 438, 311 P 2d 780, 783.

References

Chovanak v. Matthews, 120 M 520, 188 P 2d 582, 584.

Collateral References

Nuisance 71-76. 66 C.J.S. Nuisances § 78 et seq.

57-111. (8652) **Public nuisance—how abated.** A public nuisance may be abated by any public body or officer authorized thereto by law.

History: En. Sec. 4574, Civ. C. 1895; re-en. Sec. 6172, Rev. C. 1907; re-en. Sec. 8652, R. C. M. 1921. Cal. Civ. C. Sec. 3494. Field Civ. C. Sec. 1959.

Cross-References

Board of health, powers, sec. 69-606. Buildings constituting nuisance, abatement, sec. 94-1001 et seq.

Criminal nuisance, secs. 94-1001 to 94-1011.

Dilapidated buildings as nuisances, sec. 82-1219.

Encroachments on highways, removal, sec. 32-1005.

Gambling apparatus, sec. 94-2409. Liquor, unlawful sale, sec. 4-239.

Smoke as nuisance, abatement, secs. 11-2501 to 11-2511.

Unsanitary buildings as nuisance, sec. 69-111.

Collateral References

Nuisance 77-88. 66 C.J.S. Nuisances § 108.

Failure of police officer to suppress bawdyhouse as conduct contemplated by statutes which makes neglect of duty by public officer or employee a punishable offense. 134 ALR 1250.

Constitutional rights of owner as against destruction of building by public authorities. 14 ALR 2d 73.

Power of municipal corporation to declare stockyards to be nuisances. 18 ALR 2d 1039.

Tourist or trailer camps, motor courts or motels as nuisances subject to abatement. 22 ALR 2d 801.

Municipal power to abate billboards and outdoor advertising as nuisances. 58 ALR 2d 1314.

57-112. (8653) How abated by persons. Any person may abate a public nuisance which is specially injurious to him by removing, or, if necessary,

destroying the thing that constitutes the same, without committing a breach of the peace or doing unnecessary injury.

History: En. Sec. 4575, Civ. C. 1895; re-en. Sec. 6173, Rev. C. 1907; re-en. Sec. 8653, R. C. M. 1921. Cal. Civ. C. Sec. 3495. Field Civ. C. Sec. 1960.

Operation and Effect

The right given a person by this section to abate a nuisance which is especially injurious to him, may be exercised only under those circumstances which necessity indulges in cases of extremity or great emergency wherein the ordinary remedy by legal proceedings is ineffectual. Quong v. McEvoy, 70 M 99, 104, 224 P 266. In the absence of a provision in a

lease of a building requiring the tenant

to do so, it is the duty of the landlord to keep the premises in a condition fit for occupation, and where by his failure in that respect a nuisance is created, its presence is not a justification for evicting the tenant because of its existence and in reliance upon the right given a person by this section, to abate a nuisance under certain conditions. Quong v. McEvoy, 70 M 99, 104, 224 P 266.

Collateral References

Nuisance 74. 66 C.J.S. Nuisances § 106. 39 Am. Jur. 468, Nuisances, § 192.

- 57-113. (8654) Remedies for private nuisance. The remedies against a private nuisance are:
 - 1. A civil action; or,
 - Abatement.

History: En. Sec. 4590, Civ. C. 1895; re-en. Sec. 6174, Rev. C. 1907; re-en. Sec. 8654, R. C. M. 1921. Cal. Civ. C. Sec. 3501. Field Civ. C. Sec. 1961.

Injunction to Abate Private Nuisance-Action within Reasonable Time

One seeking a writ of injunction to abate a private nuisance must act within a reasonable time, since a court of equity will refuse its aid where the complainant has slept upon his rights for a considerable time by acquiescing in the alleged nuisance. Gibbs v. Gardner, 107 M 76, 82, 80 P 2d 370.

Maintenance of Headgate in Ditch

In an action to enjoin the owner of a water right in a ditch owned jointly by him and others owning small tracts of land near a city for agricultural purposes, whose rights in the water had not been

adjudicated inter sese, from operating a headgate in the ditch in an unlawful manner, and to abate a nuisance resulting therefrom, where it appeared that defendant had used the headgate in like manner since 1911, he had acquired a prescriptive right in its use, and plaintiff lost his relief through laches. Gibbs v. Gardner, 107 M 76, 82, 80 P 2d 370.

References

Chessman v. Hale, 31 M 577, 587, 79 P 254; Lennon v. City of Butte, 67 M 101, 214 P 1101.

Collateral References

Nuisance = 18 et seq. 66 C.J.S. Nuisances § 102.

Action for damages by tenant against stranger for nuisance to health and comfort. 12 ALR 2d 1228.

57-114. (8655) Abatement—when allowed. A person injured by a private nuisance may abate it by removing, or, if necessary, destroying the thing which constitutes the nuisance, without committing a breach of the peace or doing unnecessary injury.

History: En. Sec. 4591, Civ. C. 1895; re-en. Sec. 6175, Rev. C. 1907; re-en. Sec. 8655, R. C. M. 1921. Cal. Civ. C. Sec. 3502. Field Civ. C. Sec. 1962.

Operation and Effect

A complaint that the defendant city maintains a private nuisance, which the plaintiff might rightfully abate under the

provisions of this section, is sufficient, when. Murray v. City of Butte, 35 M 161, 168, 88 P 789.

Collateral References

Nuisance∞20. 66 C.J.S. Nuisances § 105. 39 Am. Jur. 467, Nuisances, § 191.

(8656) When notice is required. Where a private nuisance results from a mere omission of the wrongdoer, and cannot be abated withREMEDIES 57-115

out entering upon his land, reasonable notice must be given to him before entering to abate it.

History: En. Sec. 4592, Civ. C. 1895; re-en. Sec. 6176, Rev. C. 1907; re-en. Sec. 8656, R. C. M. 1921. Cal. Civ. C. Sec. 3503. Field Civ. C. Sec. 1963.

Reasonable Notice

There can be no question but that, in the ordinary case of this nature, a five-to ten-day notice given a local resident would be "reasonable"; it is the usual time fixed in orders to show cause and the only requirement in this state as to notice for the abatement of any nuisance is that the notice be reasonable. State ex rel. Brooks v. Cook, 84 M 478, 489, 276 P 958.

Collateral References

Nuisance 20. 66 C.J.S. Nuisances § 107.

TITLE 58

OBLIGATIONS

- Chapter 1. Obligations—definitions and rules of interpretation, 58-101 to 58-103.
 - 2. Joint and several, conditional and alternate obligations, 58-201 to 58-216.
 - 3. Transfer of obligations, 58-301 to 58-311.
 - 4. Extinction of obligations by performance, offer of performance and prevention of performance, 58-401 to 58-432.
 - Extinction of obligations by accord and satisfaction, novation and release, 58-501 to 58-511.
 - 6. Obligations imposed by law, 58-601 to 58-608.

CHAPTER 1

OBLIGATIONS—DEFINITIONS AND RULES OF INTERPRETATION

Section 58-101. Obligation defined.

58-102. How created and enforced.

58-103. General rules.

58-101. (7394) **Obligation defined.** An obligation is a legal duty, by which a person is bound to do or not to do a certain thing.

History: En. Sec. 1920, Civ. C. 1895; re-en. Sec. 4892, Rev. C. 1907; re-en. Sec. 7394, R. C. M. 1921. Cal. Civ. C. Sec. 1427. Field Civ. C. Sec. 670.

Quasi Contract

Where one has received money which, though not bound to do so by express contract, he in equity and good conscience ought to turn over to him from whom he received it, the law implies a promise on his part to that effect, and the obligation, thus created or implied by law, is termed a "quasi contract," as distinguished from a contract as defined in sections 13-101 and 13-102. Schaeffer v. Miller, 41 M 417, 420, 109 P 970, distinguished in 119 M 98, 101, 172 P 2d 306.

Tort Liability

An "obligation" is defined to be "a legal duty, by which a person is bound to do or not to do a certain thing." Such a definition includes the liability for actionable tortious conduct. Barbarich v. Chicago, M., St. P. & P. R. Co., 92 M 1, 12, 9 P 2d 797.

References

Riddell v. Peck-Williamson H. & V. Co., 27 M 44, 59, 69 P 241; Kinsman v. Stanhope, 50 M 41, 47, 144 P 1083; Stagg v. Stagg, 90 M 180, 186, 300 P 539; Jensen v. Safeway Stores, 24 F Supp 585, 588.

Collateral References

Contracts € 1 et seq. 17 C.J.S. Contracts § 1 et seq.

58-102. (7395) **How created and enforced.** An obligation arises either from:

- 1. The contract of the parties; or,
- 2. The operation of law.

An obligation arising from operation of law may be enforced by civil action or proceeding or in the manner provided by law.

History: En. Sec. 1921, Civ. C. 1895; 7395, R. C. M. 1921. Cal. Civ. C. Sec. 1428. re-en. Sec. 4893, Rev. C. 1907; re-en. Sec. Based on Field Civ. C. Sec. 671.

Where Contractual Obligation Not Assumed by Defendant, Suit for Breach Wrong Remedy

Where receiver of vendor company assigned contract of sale to another company without assumption by the latter of the vendor's obligation thereunder, and assignee sold the property to a third person subject to the rights of the deceased owner's estate, in a suit for breach of contract against the assignee company by the personal representatives of the deceased purchaser, judgment for plaintiff was er-

roneous, in absence of proof that defendant had assumed the obligations of the vendor. Under the facts, the assignee became a trustee for the original vendee by operation of law. Thompson v. Lincoln National Life Ins. Co., 114 M 521, 528, 531, 138 P 2d 951.

References

Riddell v. Peck-Williamson H. & V. Co., 27 M 44, 59, 60 P 241; Schaeffer v. Miller, 41 M 417, 424, 109 P 970; Jensen v. Safeway Stores, 24 F Supp 585, 588.

58-103. (7396) **General rules.** The rules which govern the interpretation of contracts are prescribed by sections 13-701 to 13-727. Other obligations are interpreted by the same rules by which statutes of a similar nature are interpreted.

History: En. Sec. 1930, Civ. C. 1895; re-en. Sec. 4894, Rev. C. 1907; re-en. Sec. 7396, R. C. M. 1921. Cal. Civ. C. Sec. 1429. Field Civ. C. Sec. 672.

Collateral References

Contracts € 143. 17 C.J.S. Contracts § 294.

CHAPTER 2

JOINT AND SEVERAL, CONDITIONAL AND ALTERNATE OBLIGATIONS

Section 58-201. Obligations, joint or several, etc.

58-202. When joint and several.

58-203. Contribution between joint parties.

58-204. Obligation—when conditional.

58-205. Conditions, kinds of.

58-206. Condition precedent.

58-207. Conditions concurrent.

58-208. Condition subsequent.

58-209. Performance, etc., of conditions—when essential.

58-210. When performance, etc., excused.

58-211. Impossible or unlawful conditions void.

58-212. Conditions involving forfeiture—how construed.

58-213. Who has the right of selection.

58-214. Right of selection—how lost.

58-215. Alternatives indivisible.

58-216. Nullity of one of alternative obligations.

58-201. (7397) **Obligations, joint or several, etc.** An obligation imposed upon several persons, or a right created in favor of several persons, may be:

- 1. Joint;
- 2. Several; or,
- 3. Joint and several.

History: En. Sec. 1940, Civ. C. 1895; re-en. Sec. 4895, Rev. C. 1907; re-en. Sec. 7397, R. C. M. 1921. Cal. Civ. C. Sec. 1430. Field Civ. C. Sec. 673.

Operation and Effect

Although under section 58-202, the common-law distinctions between joint, joint and several and several liabilities are abolished, under this section the rights which may be enforced by several persons are left undisturbed; they may be either

enforced jointly, severally, or jointly and severally, as the facts may warrant. Hand v. Heslet, 81 M 68, 74, 261 P 609.

References

Carlson v. Barker, 36 M 486, 492, 93 P 646.

Collateral References

Contracts 181 et seq.
17 C.J.S. Contracts 349 et seq.
12 Am. Jur. 814, Contracts, \$\$268-272.

Release of mortgagor (or intermediate grantee who has assumed the mortgage) by subsequent dealings between his grantee and mortgagee. 41 ALR 277; 72 ALR 389; 81 ALR 1016 and 112 ALR 1324.

Release of one of several joint or joint and several contract obligors as affecting liability of other obligors. 53 ALR 1420.

Oral agreements between joint obligors as to extent of liability inter se. 65 ALR 822

Release of one or more executors, administrators, or testamentary trustees as release of other or others. 116 ALR 1163.

release of other or others. 116 ALR 1163. What acts by one or more of joint tenants will sever or terminate the tenancy. 64 ALR 2d 918.

Real estate mortgage executed by one of joint tenants as severing the joint tenancy. 67 ALR 2d 999.

58-202. (7398) When joint and several. All joint obligations and covenants shall hereafter be taken and held to be joint and several obligations and covenants.

History: En. Sec. 1941, Civ. C. 1895; re-en. Sec. 4896, Rev. C. 1907; re-en. Sec. 7398, R. C. M. 1921. Cal. Civ. C. Sec. 1431.

Operation and Effect

Although under this section the commonlaw distinctions between joint, joint and several and several liabilities are abolished, under section 58-201, the rights which may be enforced by several persons are left undisturbed; they may be either enforced jointly, severally, or jointly and severally, as the facts may warrant. Hand v. Heslet, 81 M 68, 73, 261 P 609.

References

Brownlee v. Young, 25 M 38, 40, 63 P 798; Muth v. Goddard, 28 M 237, 246, 72 P 621.

58-203. (7399) Contribution between joint parties. A party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him.

History: En. Sec. 1942, Civ. C. 1895; re-en. Sec. 4897, Rev. C. 1907; re-en. Sec. 7399, R. C. M. 1921. Cal. Civ. C. Sec. 1432. Field Civ. C. Sec. 675.

Accommodation Endorsers

While it is the general rule that where a number of persons successively sign a note, they are prima-facie liable in the order in which their names appear even though they are in fact accommodation endorsers, their intention that there should be a joint, rather than a successive, liability may be inferred from the circumstances incident to the endorsements, and parol evidence is admissible to show that there was an agreement between them to that effect. Anderson v. Border, 75 M 516, 527, 244 P 494.

Relation of Parties

Where the relation of parties is merely that of joint or joint and several obligors, an action at law can be maintained by one of them against any one of the others, upon the theory that each of them, upon assuming the relation, impliedly agreed to contribute to every other such sum as the other should be compelled to pay in his behalf. Croft v. Bain, 49 M 484, 488, 143 P 960.

References

Hand v. Heslet, 81 M 68, 74, 261 P 609.

Collateral References

Contribution \$ 6. 18 C.J.S. Contribution § 4. 13 Am. Jur. 1, Contributions.

58-204. (7400) Obligation—when conditional. An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event.

History: En. Sec. 1950, Civ. C. 1895; re-en. Sec. 4898, Rev. C. 1907; re-en. Sec. 7400, R. C. M. 1921. Cal. Civ. C. Sec. 1434. Field Civ. C. Sec. 676.

References

Porter v. Plymouth Gold Min. Co., 29 M 347, 360, 74 P 938.

Collateral References

Contracts \$\simes 218 et seq.
17 C.J.S. Contracts \\$ 337 et seq.
12 Am. Jur. 848, Contracts, \\$\\$ 295-298.

58-205. (7401) Conditions, kinds of. Conditions may be precedent, concurrent, or subsequent.

History: En. Sec. 1951, Civ. C. 1895; 7401, R. C. M. 1921. Cal. Civ. C. Sec. 1435. re-en. Sec. 4899, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 677.

58-206. (7402) **Condition precedent.** A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed.

History: En. Sec. 1952, Civ. C. 1895; re-en. Sec. 4900, Rev. C. 1907; re-en. Sec. 7402, R. C. M. 1921. Cal. Civ. C. Sec. 1436. Field Civ. C. Sec. 678.

Cross-Reference

When conditions precedent void, sec. 67-403.

Abandonment of Contract

Where written contract was clear and explicit and neither party performed his part of the contract but acted contrary to the terms of the contract pursuant to a subsequent oral agreement, there was a waiver and abandonment of the original contract. Eggers v. General Refrigerating Co., 123 M 205, 210 P 2d 636, 644.

"Condition Precedent"

A "condition precedent" is one that is to be performed before the agreement becomes effective, and which calls for the happening of some event or the performance of an act after the terms thereof have been agreed upon, before the contract shall be binding on the parties. Atlantic-Pacific Oil Co. of Montana v. Gas Development Co., 105 M 1, 15, 69 P 2d 750.

Condition Precedent Must Be Alleged and Proved

Where the right of recovery is dependent upon the happening of the condition precedent, the happening of the condition must be alleged. Broat Lumber Co. v. Van Houten, 66 M 478, 480, 213 P 1116.

Where the right of recovery is dependent upon the happening of a condition precedent or of a future event, the happening of the condition or contingency must be alleged and proved, otherwise the conditions agreed to between the parties would be nullified, a new contract would be made for them by the court, and the defendant's obligation and plaintiff's right would have accrued without reference to the express terms of the agreement. Binzel v. Viehmann, 111 M 6, 10, 106 P 2d 187.

Performance of Conditions Precedent Must Be Alleged

In an action for an accounting based on a lease and management agreement by which defendant turned over his sheep ranch, farm machinery and sheep to plaintiffs, who were required to build fences, plant hay and grain crops, care for the sheep, and perform other similar duties before they would become entitled to their share of the revenue from the sale of lambs and wool, the requirements were conditions precedent and, to state a cause of action on a contract of this nature, plaintiffs were required to allege performance under this contract or set forth facts excusing failure to preform. First Nat. Bank of White Sulphur Springs v. Stoyanoff, 137 M 20, 349 P 2d 1016, 1019.

Collateral References

Contracts \$221. 17 C.J.S. Contracts § 338.

58-207. (7403) **Conditions concurrent.** Conditions concurrent are those which are mutually dependent, and are to be performed at the same time.

History: En. Sec. 1953, Civ. C. 1895; re-en. Sec. 4901, Rev. C. 1907; re-en. Sec. 7403, R. C. M. 1921. Cal. Civ. C. Sec. 1437. Field Civ. C. Sec. 679.

Delivery and Payment for Chattels

Where delivery of chattels and payment for them were to be concurrent, plaintiff in his action for breach of contract was required to show an offer and ability to pay for and receive them at the place of delivery before he could put defendant in default. Weatherman v. Reid, 62 M 522, 525, 205 P 251.

Sale of Land

One who has agreed to convey land when he has acquired title to it cannot terminate the contract without tendering a conveyance, or at least accompanying the demand for payment with an offer to convey; the obligation to convey being concurrent with the obligation to pay, the right to terminate the contract does not arise until the vendor has acquired title, and tendered or offered a conveyance. Milwaukee Land Co. v. Ruesink, 50 M 489, 505, 148 P 396.

References

Porter v. Plymouth Gold Min. Co., 29 M 347, 360, 74 P 938.

Collateral References

Contracts©=225. 17 C.J.S. Contracts § 345.

58-208. (7404) Condition subsequent. A condition subsequent is one referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition.

History: En. Sec. 1954, Civ. C. 1895; re-en. Sec. 4902, Rev. C. 1907; re-en. Sec. 7404, R. C. M. 1921. Cal. Civ. C. Sec. 1438. Field Civ. C. Sec. 680.

"Condition Subsequent"

A "condition subsequent" operates upon the estate already created and vested, rendering it liable to be defeated if the condition is broken. Atlantic-Pacific Oil Co. of Montana v. Gas Development Co., 105 M 1, 17, 69 P 2d 750.

References

Smith v. Hoffman, 56 M 299, 184 P 842.

Collateral References

Contracts \$226. 17 C.J.S. Contracts § 339.

Waiver of, or estoppel to assert, condition subsequent or its breach. 39 ALR 2d 1116.

58-209. (7405) Performance, etc., of conditions—when essential. Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party, except as provided by the next section.

History: En. Sec. 1955, Civ. C. 1895; re-en. Sec. 4903, Rev. C. 1907; re-en. Sec. 7405, R. C. M. 1921. Cal. Civ. C. Sec. 1439. Field Civ. C. Sec. 681.

Cross-Reference

Pleading and proof of performance, sec. 93-2703-3(c).

Abandonment of Contract

Where written contract was clear and explicit and neither party performed his part of the contract but acted contrary to the terms of the contract pursuant to a subsequent oral agreement, there was a waiver and abandonment of the original contract. Eggers v. General Refrigerating Co., 123 M 205, 210 P 2d 636, 644.

Delivery of Grain

Where delivery of a carload of oats and payment therefor were to be concurrent at shipping point, the buyer was required, in his action for breach of the contract of sale, to show an offer and ability to pay at that point. Jenderson v. Hansen, 50 M 216, 219, 146 P 473.

Performance of Conditions Precedent Must Be Alleged

In an action for an accounting based on a lease and management agreement by which defendant turned over his sheep ranch, farm machinery and sheep to plaintiffs, who were required to build fences, plant hay and grain crops, care for the sheep, and perform other similar duties before they would become entitled to their share of the revenue from the sale of lambs and wool, the requirements were conditions precedent and, to state a cause of action on a contract of this nature, plaintiffs were required to allege performance under this contract or set forth facts excusing failure to perform. First Nat. Bank of White Sulphur Springs v. Stoyanoff, 137 M 20, 349 P 2d 1016, 1019.

Pleading

Where the right of recovery is dependent upon the happening of a condition precedent, the happening of the condition must be alleged. Broat Lumber Co. v. Van Houten, 66 M 478, 480, 213 P 1116.

Sale of Corporate Stock

A complaint in an action to recover the purchase price of corporate stock based on a contract for its redelivery and payment of the price paid within a specified time is insufficient where the concurrent condition of redelivery is not alleged. Porter v. Plymouth Gold Min. Co., 29 M 347, 360, 74 P 938.

If an agreement relating to the sale of corporate stock gave the purchaser an option to return it on becoming dissatisfied with his bargain, return of it was a condition precedent to his right to maintain an action to recover the purchase price paid,

and defendant in such an action could invoke the doctrine of waiver and estoppel because of plaintiff's retention of dividends paid on the stock after the accrual of his right to return it. Peterson v. Nelson, 77 M 539, 553, 252 P 368.

Sale of Real Property

In an action to cancel contract for sale of real estate and forfeit the down payment, the condition that plaintiffs should secure authority from probate court to execute the deed, and make delivery of it to the defendant, within a reasonable time, was a condition precedent to putting defendant in default. Henderson v. Daniels,

62 M 363, 375, 205 P 964. (Overruled on another point by Thelen v. Vogel, 86 M 33, 43, 281 P 753.)

References

Cassidy v. Slemons & Booth, 41 M 426, 431, 109 P 976; Weatherman v. Reid, 62 M 522, 525, 205 P 251; Ray v. Divers, 72 M 513, 516, 234 P 246; Oscarson v. Grain Growers' Assn., Inc., 84 M 521, 535, 277 P 14; White v. Saby, 127 M 241, 260 P 2d 1116, 1119.

Collateral References

Contracts \$\sim 278(1).
17 C.J.S. Contracts § 452.
12 Am. Jur. 883, Contracts, §§ 328-330.

58-210. (7406) When performance, etc., excused. If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former.

History: En. Sec. 1956, Civ. C. 1895; re-en. Sec. 4904, Rev. C. 1907; re-en. Sec. 7406, R. C. M. 1921. Cal. Civ. C. Sec. 1440. Field Civ. C. Sec. 682.

References

Cassidy v. Slemons & Booth, 41 M 426, 431, 109 P 976; Oscarson v. Grain Growers' Assn., Inc., 84 M 521, 535, 277 P 14.

Collateral References

Contracts 227, 303, and other particular topics.

17 C.J.S. Contracts §§ 468, 492, 493. 12 Am. Jur. 933, Contracts, §§ 365 et seq.

58-211. (7407) Impossible or unlawful conditions void. A condition in a contract, the fulfillment of which is impossible or unlawful, within the meaning of the chapter on the object of contracts, or which is repugnant to the nature of the interest created by the contract, is void.

History: En. Sec. 1957, Civ. C. 1895; re-en. Sec. 4905, Rev. C. 1907; re-en. Sec. 7407, R. C. M. 1921. Cal. Civ. C. Sec. 1441. Field Civ. C. Sec. 683.

Cross-Reference

What deemed impossibility in contract, sec. 13-403.

References

Golden v. Brotherhood of Railroad Trainmen, 109 M 84, 88, 96 P 2d 428.

Collateral References

 $12~\mathrm{Am}.~\mathrm{Jur.}~933,~\mathrm{Contracts},~\S\S~365$ et seq.

58-212. (7408) Conditions involving forfeiture—how construed. A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created.

History: En. Sec. 1958, Civ. C. 1895; re-en. Sec. 4906, Rev. C. 1907; re-en. Sec. 7408, R. C. M. 1921. Cal. Civ. C. Sec. 1442. Field Civ. C. Sec. 684.

Assignment of Lease

Under a lease contract wherein it was agreed that the lessee would not assign the lease without the consent of the lessor, and further that the sale of more than

50% of the stock would be considered an assignment, it was held there was not a violation of the lease where the facts showed that the lessor had consented to the sale of stock in one instance, and further that such stock was then pledged as security for a loan, which security was then surrendered for the payment of the loan. Such surrender was by operation of law and provisions restraining the assign-

ment of a lease includes only voluntary assignments and is not operative against an assignment effected by law. Lipsker v. Billings Boot Shop, 129 M 420, 288 P 2d 660

Forfeiture Favored in Oil and Gas Leases

While, generally speaking, forfeitures are not favored in the law and by this section, it is provided that a condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created, in the case of an oil and gas lease, forfeiture is favored rather than frowned upon because of the injury that may result to the lessor from delay, where it clearly appears that the lessee has failed to commence operations within the time stipulated or thereafter neglected to prosecute such operations with diligence. Solberg v. Sunburst Oil & Gas Co., 76 M 254, 264, 246 P 168.

An option is a unilateral agreement

binding on the parties only if finding that plaintiff lessee of oil and gas lands was given the status of a lessor and entitled to the benefit of the exception to the general rule relating to forfeitures as applied in oil and gas leases in favor of the lessor, set forth in Solberg v. Sunburst Oil & Gas Co., 76 M 254, 246 P 168. In an action to which the landowners are not parties, brought by lessee to cancel agreement with operator classifiable as plain operating agreement and not a sublease, held, agreement construable as ordinary contract. Cedar Creek Oil & Gas Co. v. Archer, 112 M 477, 481, 117 P 2d 265.

Intention of Parties

In order to provide for a forfeiture, there must be a plainly expressed intention by the parties that the language employed is to have that effect, and a condition involving a forfeiture will be strictly interpreted against the party for whose benefit it was created. Finley v. School Dist. No. 1, 51 M 411, 416, 153 P 1010. See also Henderson v. Daniels, 62 M 363, 373, 205 P 964.

Strict Interpretation against Benefited

This section requires a condition involving a forfeiture to be strictly interpreted against the party for whose benefit it is created, and trial court erred in declaring a forfeiture of the drilling agreement between a lessee of oil and gas lands and an operator, for failure to find a market for plaintiff's share of the gas produced by defendant operator. Cedar Creek Oil & Gas Co. v. Archer, 112 M 477, 487, 117 P 2d 265.

Sufficiency of Allegations to Sustain Action on Forfeiture

While courts are reluctant to enforce forfeitures and conditions involving them must be strictly interpreted against the party for whose benefit they are created, where a purchaser of farm land, under a contract which made time of its essence and provided that in case of default in the payments stipulated for, the purchaser should forfeit his right to possession and all payments made as liquidated damages, remained in possession for ten years without any complaint, and then finding himself unable by reason of conditions beyond his control to meet the final payment, notified the vendor of his inability to make payment and of his desire to surrender the land, whereupon the contract was declared forfeited, his complaint in his action to be relieved of the forfeiture, asking recovery of the difference between the payments made by him under the contract, with taxes, insurance, cost of improvements made by him, etc., and the value of the rental of the property, held, insufficient to state facts which appeal to the conscience of a court of equity and therefore insufficient to state a cause of action under section 17-102. Estabrook v. Sonstelie, 86 M 435, 441, 284 P 147.

References

Smith v. Hoffman, 56 M 299, 184 P 842.

58-213. (7409) Who has the right of selection. If an obligation requires the performance of one of two acts in the alternative, the party required to perform has the right of selection, unless it is otherwise provided by the terms of the obligation.

History: En. Sec. 1970, Civ. C. 1895; re-en. Sec. 4907, Rev. C. 1907; re-en. Sec. 7409, R. C. M. 1921. Cal. Civ. C. Sec. 1448. Field Civ. C. Sec. 685.

Operation and Effect

Where one offered to purchase lands at a certain price, part to be paid in cash and balance in two or three years, and the vendor agreed to these terms, the vendee had the option to elect whether to make the deferred payment either in two or three years. Long v. Needham, 37 M 408, 418, 96 P 731.

Collateral References

Contracts 275 et seg, and other particular topics.
17 C.J.S. Contracts § 451 et seq.

58-214. (7410) Right of selection—how lost. If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or, if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party.

History: En. Sec. 1971, Civ. C. 1895; re-en. Sec. 4908, Rev. C. 1907; re-en. Sec. 7410, R. C. M. 1921, Cal. Civ. C. Sec. 1449. Field Civ. C. Sec. 686.

58-215. (7411) Alternatives indivisible. The party having the right of selection between alternative acts must select one of them in its entirety, and cannot select part of one and part of another without the consent of the other party.

7411, R. C. M. 1921. Cal. Civ. C. Sec. 1450. History: En. Sec. 1972, Civ. C. 1895; re-en. Sec. 4909, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 687.

58-216. (7412) Nullity of one of alternative obligations. If one of the alternative acts required by an obligation is such as the law will not enforce, or becomes unlawful or impossible of performance, the obligation is to be interpreted as though the other stood alone.

History: En. Sec. 1973, Civ. C. 1895; re-en. Sec. 4910, Rev. C. 1907; re-en. Sec. 7412, R. C. M. 1921. Cal. Civ. C. Sec. 1451. Field Civ. C. Sec. 688.

Collateral References

Contracts 237, 309, and other particular topics. 17 C.J.S. Contracts § 451 et seq.

CHAPTER 3

TRANSFER OF OBLIGATIONS

Section 58-301. Burden of obligation not transferable.

> 58-302. Rights arising out of obligation transferable.

58-303. Nonnegotiable instrument may be transferred. Covenants running with land, nature and effect of.

58-305. What covenants run with land.

Same—covenant for benefit of property. Same—covenants to pay rent, etc. 58-306.

58-307.

58-308. What covenants run with land when assigns are named,

58-309. Who are bound by covenants.

58-310. Persons not liable for breach of covenant.

Apportionment of covenants.

58-301. (7413) Burden of obligation not transferable. The burden of an obligation may be transferred with the consent of the party entitled to its benefits, but not otherwise except as provided by section 58-310.

History: En. Sec. 1980, Civ. C. 1895; re-en. Sec. 4911, Rev. C. 1907; re-en. Sec. 7413, R. C. M. 1921. Cal. Civ. C. Sec. 1457. Field Civ. C. Sec. 689.

Collateral References

Assignments 1 et seq. 6 C.J.S. Assignments § 3 et seq.

References

Forbes v. Mid-Northern Oil Co., 74 M 368, 372, 240 P 818.

58-302. (7414) Rights arising out of obligation transferable. A right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such.

History: En. Sec. 1981, Civ. C. 1895; re-en. Sec. 4912, Rev. C. 1907; re-en. Sec. 7414, R. C. M. 1921. Cal. Civ. C. Sec. 1458. Field Civ. C. Sec. 690.

References

Capital Finance Corp. v. Metropolitan Life Ins. Co., 75 M 460, 464, 243 P 1061; Apple v. Edwards, 92 M 524, 16 P 2d 700.

58-303. (7415) Nonnegotiable instrument may be transferred. A nonnegotiable written contract for the payment of money or personal property may be transferred by endorsement, in like manner with negotiable instruments. Such endorsement shall transfer all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the endorsement.

History: En. Sec. 1982, Civ. C. 1895; re-en. Sec. 4913, Rev. C. 1907; re-en. Sec. 7415, R. C. M. 1921. Cal. Civ. C. Sec. 1459.

Operation and Effect

This section is not in conflict with section 93-2802, and neither in any way enlarges the scope of the other or affects the purpose which it was intended to accomplish, so as to permit a setoff against the assignee of a demand against the assignor arising intermediate the endorsement and notice thereof. Stadler v. First Nat. Bank, 22 M 190, 209, 56 P 111; Cornish v. Woolverton, 32 M 456, 473, 81 P 4.

The purpose of this section is to protect

The purpose of this section is to protect the assignee of a nonnegotiable contract against counterclaims, including setoffs, alleged as defenses, unless they are in existence and available at the date of the assignment. Stadler v. First Nat. Bank, 22 M 190, 208, 56 P 111; Cornish v. Woolverton, 32 M 456, 473, 81 P 4.

A demand against the assignor of a

nonnegotiable contract cannot be set off against the assignee, unless due and payable when the assignment was made, and notice was unnecessary to prevent setoff of a demand becoming payable subsequently. Stadler v. First Nat. Bank, 22 M 190, 210, 56 P 111; Cornish v. Woolverton, 32 M 456, 473, 81 P 4.

References

Northwestern Improvement Co. v. Rhoades, 52 M 428, 434, 158 P 832; Newer v. First Nat. Bank of Harlem, 74 M 549, 556, 241 P 613; Apple v. Edwards, 92 M 524, 535, 16 P 2d 700, 87 ALR 179.

Collateral References

Assignments 16 et seq. 6 C.J.S. Assignments § 23 et seq.

Law Review

Montana Law and the Uniform Commercial Code, 21 Mont. L. Rev. 1, 40 (Fall 1959).

58-304. (7416) Covenants running with land, nature and effect of. Certain covenants, contained in grants of estates in real property, are appurtenant to such estates, and pass with them, so as to bind the assigns of the covenanter and to vest in the assigns of the covenantee, in the same manner as if they had personally entered into them. Such covenants are said to run with the land.

History: En. Sec. 1983, Civ. C. 1895; re-en. Sec. 4914, Rev. C. 1907; re-en. Sec. 7416, R. C. M. 1921. Cal. Civ. C. Sec. 1460. Field Civ. C. Sec. 691.

References

Orchard Homes Ditch Co. v. Snavely, 117 M 484, 488, 159 P 2d 521.

Collateral References

Covenants 53-84.

21 C.J.S. Covenants §§ 54, 56-86.

14 Am. Jur. 435, Covenants, Conditions and Restrictions, §§ 6 et seq.

Continued value of restrictive covenant to dominant owner in protection of his property from competition as basis for its enforcement notwithstanding changes in neighborhood conditions. 2 ALR 2d 601.

neighborhood conditions. 2 ALR 2d 601.
Restrictive covenants, conditions or agreements in respect of real property discriminating against persons on account of race, color, or religion. 3 ALR 2d 466.

Change of neighborhood in restricted

district as affecting restrictive covenant. 4 ALR 2d 11.

Use of property by college fraternity or sorority as violation of restrictive covenant. 7 ALR 2d 436.

Garage as part of house with which it is physically connected within restrictive covenant. 7 ALR 2d 593.

Covenant of lessee to insure as running with the land. 18 ALR 2d 1051.

Restrictive covenants as affecting fences, or walls or hedges similar thereto. 23 ALR 2d 937.

Maintenance, use, or grant of right of way over restricted property as violation of restrictive covenant. 25 ALR 2d 904.

of restrictive covenant. 25 ALR 2d 904. Restrictive covenant in respect of purchase or handling of petroleum products by operator of filling station. 26 ALR 2d 219.

"Fronting" of corner lot on both streets or on only one, within setback or building line restriction. 30 ALR 2d 561.

Covenant in conveyance requiring erection of dwelling as prohibiting use of prop-

erty for business or other nonresidential purposes. 32 ALR 2d 1207.

Building side line restrictive covenants. 36 ALR 2d 861.

Affirmative covenants as running with the land. 68 ALR 2d 1022.

Party wall agreement as running with the land. 68 ALR 2d 1033.

Restrictive covenant as to keeping cats on premises. 73 ALR 2d 1040.

Use of premises for parking place as violation of restrictive covenant. 80 ALR 2d 1258.

58-305. (7417) What covenants run with land. The only covenants which run with the land are those specified in this chapter, and those which are incidental thereto.

History: En. Sec. 1984, Civ. C. 1895; re-en. Sec. 4915, Rev. C. 1907; re-en. Sec. 7417, R. C. M. 1921. Cal. Civ. C. Sec. 1461. Field Civ. C. Sec. 692.

References

Orchard Homes Ditch Co. v. Snavely, 117 M 484, 488, 159 P 2d 521.

58-306. (7418) Same—covenant for benefit of property. Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land.

History: En. Sec. 1985, Civ. C. 1895; re-en. Sec. 4916, Rev. C. 1907; re-en. Sec. 7418, R. C. M. 1921. Cal. Civ. C. Sec. 1462. Field Civ. C. Sec. 693.

References

Thomas v. Standard Development Co., 70 M 156, 174, 224 P 870.

58-307. (7419) Same—covenants to pay rent, etc. The last section includes covenants "of warranty," "for quiet enjoyment," or for further assurance on the part of the grantor, and covenants for the payment of rent, or of taxes or assessments upon the land, on the part of a grantee.

History: En. Sec. 1986, Civ. C. 1895; re-en. Sec. 4917, Rev. C. 1907; re-en. Sec. 7419, R. C. M. 1921. Cal. Civ. C. Sec. 1463. Field Civ. C. Sec. 694.

References

Thomas v. Standard Development Co., 70 M 156, 175, 224 P 870.

58-308. (7420) What covenants run with land when assigns are named. A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property, and made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with the land so far as the assigns thus mentioned are concerned.

History: En. Sec. 1987, Civ. C. 1895; 7420, R. C. M. 1921. Cal. Civ. C. Sec. 1464. re-en. Sec. 4918, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 695.

58-309. (7421) **Who are bound by covenants.** A covenant running with the land binds those only who acquire the whole estate of the covenantor in some part of the property.

History: En. Sec. 1988, Civ. C. 1895; re-en. Sec. 4919, Rev. C. 1907; re-en. Sec. 7421, R. C. M. 1921. Cal. Civ. C. Sec. 1465. Field Civ. C. Sec. 696. Collateral References

Covenants \$84. 21 C.J.S. Covenants §86.

58-310. (7422) **Persons not liable for breach of covenant.** No one, merely by reason of having acquired an estate subject to a covenant running

with the land, is liable for a breach of the covenant before he acquired the estate, or after he has parted with it or ceased to enjoy its benefits.

History: En. Sec. 1989, Civ. C. 1895; re-en. Sec. 4920, Rev. C. 1907; re-en. Sec. 7422, R. C. M. 1921. Cal. Civ. C. Sec. 1466. Field Civ. C. Sec. 697.

58-311. (7423) Apportionment of covenants. Where several persons, holding by several titles, are subject to the burden or entitled to the benefits of a covenant running with the land, it must be apportioned among them according to the value of the property subject to it held by them respectively, if such value can be ascertained, and if not, then according to their respective interests in point of quantity.

History: En. Sec. 1990, Civ. C. 1895; re-en. Sec. 4921, Rev. C. 1907; re-en. Sec. 7423, R. C. M. 1921. Cal. Civ. C. Sec. 1467. Field Civ. C Sec. 698.

Collateral References

14 Am. Jur. 495, Covenants, Conditions and Restrictions, § 19.

References

Thomas v Standard Development Co., 70 M 156, 174, 224 P 870.

CHAPTER 4

EXTINCTION OF OBLIGATIONS BY PERFORMANCE, OFFER OF PERFORMANCE AND PREVENTION OF PERFORMANCE

Obligation extinguished by performance. Section 58-401.

58-402. Performance by one of several joint debtors.

58-403. Performance to one of joint creditors.

58-404. Effect of directions by creditors.

58-405. Partial performance. 58-406. Payment, what constitutes.

58-407. Application of general performance.

58-408. Obligation extinguished by offer of performance.

58-409. Offer of partial performance.

58-410. By whom to be made.

58-411. To whom to be made.

58-412. Where offer may be made.

58-413. When offer must be made.

58-414. Same—when obligation does not fix time. 58-415. Compensation after delay in performance

Compensation after delay in performance.

58-416. Offer to be made in good faith.

58-417. Conditional offer.

58-418. Ability and willingness essential.

58-419. Production of thing to be delivered not necessary. 58-420. Thing offered to be kept separate.

58-421. Performance of condition precedent or concurrent.

58-422. Written receipts.

58-423. Extinction of pecuniary obligation.

58-424. Objections to m. 58-425. Title to thing offered. Objections to mode of offer.

58-426. Custody of thing offered.

58-427. Effect of offer on interest and accessories of obligation.

58-428. Creditor's retention of thing which he refuses to accept.

58-429. What excuses performance, etc.

58-430. Effect of prevention of performance.

58-431. Same—ratable portion of consideration, when.

58-432. Effect of refusal to accept performance before offer.

58-401. (7424) Obligation extinguished by performance. Full performance of an obligation by the party whose duty it is to perform it, or by any other person on his behalf, and with his assent, if accepted by the creditor, extinguishes it.

History: En. Sec. 2000, Civ. C. 1895; re-en. Sec. 4922, Rev. C. 1907; re-en. Sec. 7424, R. C. M. 1921. Cal. Civ. C. Sec. 1473. Field Civ. C. Sec. 699.

Cross-Reference

Specific performance, secs. 17-801 to 17-812.

References

Thomas v. Standard Development Co., 70 M 156, 175, 224 P 870; Hale v. Belgrade Co., 75 M 99, 114, 242 P 425.

Collateral References

Contracts \Longrightarrow 275 et seq. and other particular topics.

17 C.J.S. Contracts § 393. 12 Am. Jur. 981, Contracts, § 403.

58-402. (7425) **Performance by one of several joint debtors.** Performance of an obligation by one of several persons who are jointly liable under it extinguishes the liability of all.

History: En. Sec. 2001, Civ. C. 1895; re-en. Sec. 4923, Rev. C. 1907; re-en. Sec. 7425, R. C. M. 1921. Cal. Civ. C. Sec. 1474. Field Civ. C. Sec. 700.

Joint and Several Note

Where a note sued upon is joint and

several, the complaint must, in order to show a breach of the condition of the obligation, allege that payment has not been made by any of the parties liable, since payment by one of the makers extinguishes the liability of all. First Nat. Bank v. Silver, 45 M 231, 235, 122 P 584.

58-403. (7426) Performance to one of joint creditors. An obligation in favor of several persons is extinguished by performance rendered to any of them, except in the case of a deposit made by owners in common, or in joint ownership, which is regulated by the chapter on deposit.

History: En. Sec. 2002, Civ. C. 1895; re-en. Sec. 4924, Rev. C. 1907; re-en. Sec.

7426, R. C. M. 1921. Cal. Civ. C. Sec. 1475. Field Civ. C. Sec. 701.

58-404. (7427) **Effect of directions by creditors.** If a creditor, or any one of two or more joint creditors, at any time directs the debtor to perform his obligations in a particular manner, the obligation is extinguished by performance in that manner, even though the creditor does not receive the benefit of such performance.

History: En. Sec. 2003, Civ. C. 1895; re-en. Sec. 4925, Rev. C. 1907; re-en. Sec. 7427, R. C. M. 1921. Cal. Civ. C. Sec. 1476. Field Civ. C. Sec. 702.

Extinguishment of Debt

Where a creditor directed his debtor (his niece) to transfer property to her daughters in payment of the debt without con-

sideration moving from them to him and the transfer was made, a finding that it was based on the consideration of natural love and affection only was erroneous, the consideration having been the extinguishment of the debt due from the grantor to her creditor. Hale v. Belgrade Co., 75 M 99, 114, 242 P 425.

58-405. (7428) **Partial performance.** Partial performance of an indivisible obligation extinguishes a corresponding proportion thereof, if the benefit of such performance is voluntarily retained by the creditor, but not otherwise. If such partial performance is of such a nature that the creditor cannot avoid retaining it without injuring his own property, his retention thereof is not presumed to be voluntary.

History: En. Sec. 2004, Civ. C. 1895; re-en. Sec. 4926, Rev. C. 1907; re-en. Sec. 7428, R. C. M. 1921. Cal. Civ. C. Sec. 1477. Field Civ. C. Sec. 703.

Election of Remedies

Remedy of plaintiff for partial performance of contract. McFarland v. Welch, 48 M 196, 199, 136 P 394.

A contractor may, on breach of the contract by the other party to it by refusal to make a payment becoming due to him during the progress of the work as provided therein, discontinue work and elect either to sue upon the contract to recover damages for its breach, or ignore the contract and bring action on quantum meruit; and where he pursues the former remedy he is entitled to recover the entire amount due at the time defendant made default, including the percentages reserved on previous estimates, with interest, from the date on which the contract was breached. Clifton-Applegate-Toole v. Drain Dist. No. 1, 82 M 312, 335, 267 P 207.

Retention of Benefits from Work Done

Where defendant's retention of benefits from work done under the partial performance of a contract to plow and sow land with wheat was not voluntary it was not liable for the work done. Waite v. Shoemaker & Co., 50 M 264, 286, 146 P 736.

References

Riddell v. Peck-Williamson H. & V. Co., 27 M 44, 62, 69 P 241.

Collateral References

Contracts 5 297 and other particular topics.

17 C.J.S. Contracts § 511.

12 Am. Jur. 903, Contracts, §§ 344-348.

58-406. (7429) **Payment, what constitutes.** Performance of an obligation for the delivery of money only is called payment.

History: En. Sec. 2005, Civ. C. 1895; re-en. Sec. 4927, Rev. C. 1907; re-en. Sec. 7429, R. C. M. 1921. Cal. Civ. C. Sec. 1478. Field Civ. C. Sec. 704.

Payment by Way of Credits

A plea of payment by defendant in an action for money due means payment in money (this section); therefore where payment under an agreement to accept something other than money in satisfaction of an obligation is asserted, it must be specially pleaded; when not so pleaded, evidence of payment made by way of credits other than cash is inadmissible. Billings v. Montana W. P. Sash Co., 88 M 322, 336, 292 P 714. (Overruled on another point by Caird Eng. Wks. v. Seven-Up Min. Co., 111 M 471, 493, 111 P 2d 1267.)

Promissory Note

In the absence of an agreement, either express or implied, providing otherwise, "payment" means the discharge of a debt or obligation in money; hence mere delivery and acceptance of a promissory note for the amount of an account, wheth-

er it be the note of a debtor or of another, does not operate to discharge the debt. Gallaher v. Theilbar Realties, 93 M 421, 426, 18 P 2d 1101.

Where Payment Alone Does Not Constitute Performance

Performance of a contract is the doing of the things promised to be done, and while the obligation may be for the delivery of money only, in which event performance is called "payment." where the contract calls for the doing of various things (as did the contract in the instant case, payment being one of them), payment alone would not constitute performance. Hardenburgh v. Hardenburgh, 115 M 469, 478, 146 P 2d 151.

References

Brennan v. Northern Electric Co., 72 M 35, 40, 231 P 388; Hale v. Belgrade Co., 75 M 99, 114, 242 P 425.

Collateral References

Payment \$ 1.
70 C.J.S. Payment \$ 1.
40 Am. Jur. 707, Payment, \$ 2.

- 58-407. (7430) Application of general performance. Where a debtor, under several obligations to another, does an act, by way of performance, in whole or in part, which is equally applicable to two or more of such obligations, such performance must be applied as follows:
- 1. If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation, be manifested to the creditor, it must be so applied.
- 2. If no such application be then made, the creditor, within a reasonable time after such performance, may apply it toward the extinction of any obligation, performance of which was due to him from the debtor, at the time of such performance, except that if similar obligations were due to him, both individually and as a trustee, he must, unless otherwise directed

by the debtor, apply the performance to the extinction of all such obligations in equal proportion; and an application once made by the creditor cannot be rescinded without the consent of the debtor.

3. If neither party makes such application within the time prescribed herein, the performance must be applied to the extinction of obligations in the following order; and, if there be more than one obligation of a particular class, to the extinction of all in that class, ratably:

First—Of interest due at the time of the performance.

Second—Of principal due at that time.

Third—Of the obligation earliest in date of maturity.

Fourth-Of an obligation not secured by a lien or collateral undertaking.

Fifth—Of an obligation secured by a lien or collateral undertaking.

History: En. Sec. 2006, Civ. C. 1895; re-en. Sec. 4928, Rev. C. 1907; re-en. Sec. 7430, R. C. M. 1921. Cal. Civ. C. Sec. 1479. Based on Field Civ. C. Sec. 705.

Agreement as to Application of Payment

Where several written instruments relating to the same indebtedness contained no provision for the order of payment, parol evidence was competent to show what application of a payment was agreed on. Grogan v. Valley Trading Co., 30 M 229, 237, 76 P 211.

Carey Land Act—Payment of Installment Credited to Interest on Water Stock Contract Tolls Statute of Limitations

In an action to recover balance due on contract for the purchase of water stock and to foreclose mortgages on land securing contracts, where company constructed its water distribution system under contract with the Carey Land Act board, payment of an installment of the purchase price made eight years before suit and credited first to interest on the entire unpaid balance, prevented the eight-year statute of limitations from running against any of the installments remaining unpaid. Valier-Montana Land & Water Co. v. Ries, 109 M 508, 517, 97 P 2d 584.

Direction of Application of Payment by Debtor

Under this section, a debtor owing more than one debt or a debt consisting of more than one item (as principal and interest) has the right to direct application of a payment voluntarily made by him, and if the creditor accepts the payment and retains it, the law will treat it as having been applied as directed. Monidah Trust v. Hruze, 62 M 444, 449, 451, 205 P 232.

When a debtor owes more than one debt and on making a general payment fails to direct the creditor as to which debt should receive the credit, the creditor may apply it on any one of the debts, secured or unsecured, and a surety on the secured debt is in no position to complain if made on one unsecured. National Bank v. Bingham, 91 M 62, 72, 5 P 2d 554.

No Presumption That Payments Made on Last Accruing Obligation

It is incumbent upon defendant, in order for him to sustain the burden of proof that an action to recover wages due under a contract of employment was barred because most of the items accrued more than five years prior to commencement of the action, to show that the partial payments were applied on the items last accruing rather than the oldest, the record failing to show any direction for application thereof by either party. There is no presumption that payments were made on an obligation last accruing. Girson v. Girson, 112 M 183, 186, 114 P 2d 274.

When Consent Necessary for Application

Where defendant in action to recover balance due for goods, wares and merchandise claimed he turned the property over to a corporation which agreed to discharge his personal debts incurred in working the mine, and that the plaintiff had so applied certain payments made by it, held, that in absence of showing that the corporation had consented to having payments made by it so applied, neither plaintiff nor defendant could rely on the doctrine of application of payments declared by this section. Ingman v. Hewitt, 107 M 267, 270, 86 P 2d 653.

References

Conrad Mercantile Co. v. Siler, 75 M 36, 40, 241 P 617; Billings v. Missoula W. P. Sash Co., 88 M 322, 336, 292 P 714; Mercer v. Mercer, 120 M 132, 180 P 2d 248, 250.

Collateral References

Payment \$\infty\$ 36-47 and other particular topics.

70 C.J.S. Payment §§ 50-80.

40 Am. Jur. 790, Payment, §§ 108 et seq.

58-408. (7431) Obligation extinguished by offer of performance. An obligation is extinguished by an offer of performance, made in conformity to the rules herein prescribed, and with intent to extinguish the obligation.

History: En. Sec. 2020, Civ. C. 1895; re-en. Sec. 4929, Rev. C. 1907; re-en. Sec. 7431, R. C. M. 1921. Cal. Civ. C. Sec. 1485. Field Civ. C. Sec. 706.

Operation and Effect

An unconditional offer in good faith to perform made by the party upon whom the obligation rests, coupled with the ability to perform, is equivalent to full performance, and extinguishes the obligation as to the party making the offer, and a wrongful refusal to accept it disables the other party from claiming any benefit. Lehrkind v. McDonnell, 51 M 343, 350, 153 P 1012.

Collateral References

Contracts 279; Tender 19 et seq. 17 C.J.S. Contracts \$489; 86 C.J.S. Tender \$50 et seq.

58-409. (7432) Offer of partial performance. An offer of partial performance is of no effect.

History: En. Sec. 2021, Civ. C. 1895; re-en. Sec. 4930, Rev. C. 1907; re-en. Sec. 7432, R. C. M. 1921. Cal. Civ. C. Sec. 1486. Field Civ. C. Sec. 707.

Collateral References

Contracts \$279; Tender 10 et seq. 17 C.J.S. Contracts \$480 et seq.; 86 C.J.S. Tender \$7 et seq.

58-410. (7433) **By whom to be made.** An offer of performance must be made by the debtor, or by some person on his behalf and with his assent.

History: En. Sec. 2022, Civ. C. 1895; re-en. Sec. 4931, Rev. C. 1907; re-en. Sec. 7433, R. C. M. 1921. Cal. Civ. C. Sec. 1487. Field Civ. C. Sec. 708.

Collateral References

12 Am. Jur. 889, Contracts, §§ 333-335.

58-411. (7434) To whom to be made. An offer of performance must be made to the creditor, or to any one or two or more joint creditors, or to a person authorized by one or more of them to receive or collect what is due under the obligation, if such creditor or authorized person is present at the place where the offer may be made; and, if not, wherever the creditor may be found.

History: En. Sec. 2023, Civ. C. 1895; re-en. Sec. 4932, Rev. C. 1907; re-en. Sec. 7434, R. C. M. 1921. Cal. Civ. C. Sec. 1488. Based on Field Civ. C. Sec. 709.

Place of Payment

Where contract was silent as to place of performance the proper place for trial was the county of the debtor's residence at the time the suit was commenced. Hardenburgh v. Hardenburgh, 115 M 469, 473, 146 P 2d 151, overruling Hough v. Rocky Mountain Fire Ins. Co., 70 M 244, 249, 224 P 858.

References

State ex rel. Western A. & I. Co. v. District Court, 55 M 330, 336, 176 P 613; Lillis v. City of Big Timber, 103 M 206, 210, 62 P 2d 219.

Collateral References

Contracts \cong 279; Tender \cong 7. 17 C.J.S. Contracts § 485; 86 C.J.S. Tender § 39 et seq.

- **58-412.** (7435) Where offer may be made. In the absence of an express provision to the contrary, an offer of performance may be made, at the option of the debtor:
 - 1. At any place appointed by the creditor; or,
- 2. Wherever the person to whom the offer ought to be made can be found; or,
- 3. If such person cannot, with reasonable diligence, be found within the state, and within a reasonable distance from his residence or place

of business, or if he evades the debtor, then at his residence or place of business, if the same can, with reasonable diligence, be found within the state; or,

4. If this cannot be done, then at any place within this state.

History: En. Sec. 2024, Civ. C. 1895; re-en. Sec. 4933, Rev. C. 1907; re-en. Sec. 7435, R. C. M. 1921, Cal. Civ. C. Sec. 1489. Field Civ. C. Sec. 710.

Place of Payment

Where contract was silent as to place of performance the proper place for trial was the county of the debtor's residence at the time the suit was commenced. Hardenburgh v. Hardenburgh, 115 M 469, 473, 146 P 2d 151, overruling Hough v. Rocky Mountain Fire Ins. Co., 70 M 244, 249, 224 P 858.

References

State ex rel. Western A. & I. Co. v. District Court, 55 M 330, 336, 176 P 613; Lillis v. City of Big Timber, 103 M 206, 210, 62 P 2d 219.

Collateral References

Contracts 279; Tender 28.
17 C.J.S. Contracts § 484; 86 C.J.S. Tender § 18 et seq.

58-413. (7436) When offer must be made. Where an obligation fixes a time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before nor afterwards.

History: En. Sec. 2025, Civ. C. 1895; re-en. Sec. 4934, Rev. C. 1907; re-en. Sec. 7436, R. C. M. 1921. Cal. Civ. C. Sec. 1490. Field Civ. C. Sec. 711.

Collateral References

Contracts 279; Tender 9.
17 C.J.S. Contracts 482; 86 C.J.S. Tender 13 et seq.

58-414. (7437) Same—when obligation does not fix time. Where an obligation does not fix the time for its performance, an offer of performance may be made at any time before the debtor, upon reasonable demand, has refused to perform.

History: En. Sec. 2026, Civ. C. 1895; re-en. Sec. 4935, Rev. C. 1907; re-en. Sec.

7437, R. C. M. 1921. Cal. Civ. C. Sec. 1491. Field Civ. C. Sec. 712.

58-415. (7438) Compensation after delay in performance. Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditor, or by any other person, in the meantime.

History: En. Sec. 2027, Civ. C. 1895; re-en. Sec. 4936, Rev. C. 1907; re-en. Sec. 7438, R. C. M. 1921. Cal. Civ. C. Sec. 1492. Field Civ. C. Sec. 713.

Sale of Real Property

Where an oral contract was made to sell real property, and suit was brought by the vendee for specific performance, the court could not say according to the facts of the case, that time was of the essence of the agreement. Stevens v. Trafton, 36 M 520, 529, 93 P 810.

Sale of Sheep

Where time was not of the essence of

a contract for the sale of sheep, the buyers could not claim violation of the contract or rescind for nondelivery on the day specified, without giving the seller an opportunity to tender performance, with compensation for delay; and the seller was obliged, within a reasonable time, to tender performance, coupled with an offer to compensate for delay. Curtis v. Parham, 49 M 140, 145, 140 P 511.

References

Continental Oil Co. v. McNair Realty Co., 137 M 410, 353 P 2d 100, 109.

58-416. (7439) Offer to be made in good faith. An offer of performance must be made in good faith, and in such manner as is most likely, under the circumstances, to benefit the creditor.

History: En. Sec. 2028, Civ. C. 1895; re-en. Sec. 4937, Rev. C. 1907; re-en. Sec. 7439, R. C. M. 1921. Cal. Civ. C. Sec. 1493. Field Civ. C. Sec. 714.

References

Lehrkind v. McDonnell, 51 M 343, 350, 153 P 1012; Nielson v. Hendrickson, 63 M 518, 523, 210 P 905.

58-417. (7440) Conditional offer. An offer of performance must be free from any conditions which the creditor is not bound, on his part, to perform.

History: En. Sec. 2029, Civ. C. 1895; re-en. Sec. 4938, Rev. C. 1907; re-en. Sec. 7440, R. C. M. 1921. Cal. Civ. C. Sec. 1494. Field Civ. C. Sec. 715.

Operation and Effect

Under this section, an offer of performance must be free from any condition which the other party is not bound to meet; hence the lessee of land for oil and gas exploration under a contract which inter alia provided that moneys to be paid by him should be paid to the lessor or deposited in bank for his credit was not excused from making payment of delay money by the refusal of the lessor to execute an indemnity bond assuring proper apportionment of the money among grantees of portions of the lands sold after execution of the lease, the transferees having taken subject to its provisions; the lessee, by making payment as

provided, would have been released from all claims by the transferees and was therefore in no position to insist upon acceptance of the condition prior to making payment. Thomas v. Standard Development Co., 70 M 156, 175, 224 P 870.

opment Co., 70 M 156, 175, 224 P 870.

An offer to perform by the party upon whom the obligation rests, must be unconditional and made in good faith, coupled with the ability to perform; hence where the seller of sheep, sued for damages for failure to make delivery, offered to deliver the animals provided a certain person could select them, the offer was conditional and of no avail to him as a defense. Hanlon v. Manger, 85 M 31, 39, 277 P 433.

References

Lehrkind v. McDonnell, 51 M 343, 350, 153 P 1012.

58-418. (7441) Ability and willingness essential. An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer.

History: En. Sec. 2030, Civ. C. 1895; re-en. Sec. 4939, Rev. C. 1907; re-en. Sec. 7441, R. C. M. 1921. Cal. Civ. C. Sec. 1495. Field Civ. C. Sec. 716.

References

Lehrkind v. McDonnell, 51 M 343, 350, 153 P 1012; Brennan v. Northern Electric Co., 72 M 35, 40, 231 P 388.

58-419. (7442) Production of thing to be delivered not necessary. The thing to be delivered, if any, need not in any case be actually produced, upon an offer of performance, unless the offer is accepted.

History: En. Sec. 2031, Civ. C. 1895; 7442, R. C. M. 1921. Cal. Civ. C. Sec. re-en. Sec. 4940, Rev. C. 1907; re-en. Sec. 1496. Field Civ. C. Sec. 717.

58-420. (7443) Thing offered to be kept separate. A thing, when offered by way of performance, must not be mixed with other things from which it cannot be separated immediately and without difficulty.

History: En. Sec. 2032, Civ. C. 1895; re-en. Sec. 4941, Rev. C. 1907; re-en. Sec. 7443, R. C. M. 1921. Cal. Civ. C. Sec. 1497. Field Civ. C. Sec. 718.

Collateral References

Contracts \$279; Tender \$11 et seq. 17 C.J.S. Contracts \$486; 86 C.J.S. Tender \$27 et seq.

58-421. (7444) Performance of condition precedent or concurrent. When a debtor is entitled to the performance of a condition precedent to, or

concurrent with, performance on his part, he may make his offer to depend upon the due performance of such condition.

History: En. Sec. 2033, Civ. C. 1895; re-en. Sec. 4942, Rev. C. 1907; re-en. Sec. 7444, R. C. M. 1921. Cal. Civ. C. Sec. 1498. Field Civ. C. Sec. 719.

Cross-Reference

Revocation of proposal by failure to perform condition precedent, sec. 13-323.

58-422. (7445) Written receipts. A debtor has a right to require from his creditor a written receipt for any property delivered in performance of his obligation.

History: En. Sec. 2034, Civ. C. 1895; re-en. Sec. 4943, Rev. C. 1907; re-en. Sec.

7445, R. C. M. 1921. Cal. Civ. C. Sec. 1499. Field Civ. C. Sec. 720.

58-423. (7446) Extinction of pecuniary obligation. An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this state, of good repute, and notice thereof is given to the creditor.

History: En. Sec. 2035, Civ. C. 1895; re-en. Sec. 4944, Rev. C. 1907; re-en. Sec. 7446, R. C. M. 1921. Cal. Civ. C. Sec. 1500. Field Civ. C. Sec. 721.

Conditional Tender

A tender is not valid when accompanied with conditions which the tenderer has no right to make, and in order for a tender to operate as payment of an obligation it must be for the full amount thereof. Advance-Rumeley Thresher Co., Inc. v. Hess, 85 M 293, 301, 279 P 236.

Method of Payment

Where payment of judgment was tendered and refused, payment should be made under the provisions of this section and not by deposit in court. Galbreath v. Armstrong, 121 M 387, 193 P 2d 630, 632.

Tender in Redemption

After a tender in redemption had been

made and refused, plaintiff was not required, in order to keep it good, to deposit the money in court and keep it there. Hamilton v. Hamilton, 51 M 509, 536, 154 P 717.

References

Morrison v. Ornbaun, 30 M 111, 113, 75 P 953; Eskestrand v. Wunder, 94 M 57, 67, 20 P 2d 622; Federal Land Bank of Spokane v. Green, 108 M 56, 67, 90 P 2d 489; Continental Oil Co. v. McNair Realty Co., 137 M 410, 353 P 2d 100, 104; Gamble-Skogmo Inc. v. McNair Realty Co., 98 F Supp 440, 444.

Collateral References

Payment € 50. 70 C.J.S. Payment § 38. 40 Am. Jur. 817, Payment, §§ 151 et seq.

58-424. (7447) **Objections to mode of offer.** All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor, if not then stated.

History: En. Sec. 2036, Civ. C. 1895; re-en. Sec. 4945, Rev. C. 1907; re-en. Sec. 7447, R. C. M. 1921. Cal. Civ. C. Sec. 1501. Field Civ. C. Sec. 722.

Collateral References

Tender \$\sim 15. 86 C.J.S. Tender \\$\\$ 12, 17, 20, 26, 34, 43.

58-425. (7448) Title to thing offered. The title to a thing duly offered in performance of an obligation passes to the creditor, if the debtor at the time signifies his intention to that effect.

History: En. Sec. 2037, Civ. C. 1895; 7448, R. C. M. 1921. Cal. Civ. C. Sec. 1502. re-en. Sec. 4946, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 723.

58-426. (7449) **Custody of thing offered.** The person offering a thing, other than money, by way of performance, must, if he means to treat it as belonging to the creditor, retain it as a depositary for hire, until the

creditor accepts it, or until he has given reasonable notice to the creditor that he will retain it no longer, and, if with reasonable diligence he can find a suitable depositary therefor, until he has deposited it with such person.

History: En. Sec. 2038, Civ. C. 1895; 7449, R. C. M. 1921. Cal. Civ. C. Sec. 1503. re-en. Sec. 4947, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 724.

58-427. (7450) Effect of offer on interest and accessories of obligation. An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all incidents as a performance thereof.

History: En. Sec. 2039, Civ. C. 1895; re-en. Sec. 4948, Rev. C. 1907; re-en. Sec. 7450, R. C. M. 1921. Cal. Civ. C. Sec. 1504. Field Civ. C. Sec. 725.

Contract for Purchase of Ranch

A ranch was sold on an installment plan the contract providing for a down payment and then ten annual payments at five per cent interest, possession April 1, 1954. The sellers retained possession of the ranch and operated it until April 1960. The purchaser did not tender the various amounts due except as to the "binder" payment, in effect borrowing the deferred payments at five per cent. Since the purchaser received a reasonable rental value for the property he was required to stand a reduction of the amount of interest due under the contract on all payments over the down payment of twentynine per cent for the time they were due. Hughes v. Melby, — M —, 362 P 2d 1014, 1018, 1020.

Effect of Dispute as to Consideration

Where there was a bona fide dispute between the makers and payees of a renewal note as to whether there was a partial failure of consideration, an offer to pay an amount not including the disputed item did not bar the payees' right to hold mortgage security. Jensen v. Franklin, 135 M 341, 340 P 2d 832.

Release of Lien

Since a tender has the same effect upon all the incidents of the obligation as actual payment, if a debt is secured by a lien upon property, or by sureties, the tender operates as a release of the lien or the sureties, the creditor being left to his personal claim against the debtor. Hamilton v. Hamilton, 51 M 509, 536, 154 P 717.

Right of Redemption

Where one entitled to redeem from execution sale fully complies with the statutory requirements, such compliance results in a completed redemption, and a sheriff's deed to the property issued thereafter to the purchaser is void, since the redemption operated to transfer to the redemptioner all the right, title and interest acquired by the purchaser. Leonard v. Western, 74 M 513, 518, 241 P 523.

References

Brennan v. Northern Electric Co., 72 M 35, 40, 231 P 388; Federal Land Bank of Spokane v. Green, 108 M 56, 67, 90 P 2d 489.

Collateral References

Interest ≈ 50. 47 C.J.S. Interest § 52.

Effect of tender of purchase money on rights as between vendor and vendee under land contract in respect of interest. 25 ALR 2d 973.

58-428. (7451) Creditor's retention of thing which he refuses to accept. If anything is given to a creditor by way of performance, which he refuses to accept as such, he is not bound to return it without demand; but if he retains it, he is a gratuitous depositary thereof.

History: En. Sec. 2040, Civ. C. 1895; re-en. Sec. 4949, Rev. C. 1907; re-en. Sec. 7451, R. C. M. 1921. Cal. Civ. C. Sec. 1505. Field Civ. C. Sec. 726.

References

Hamilton v. Hamilton, 51 M 509, 536, 154 P 717.

Collateral References

Bailment = 1; Tender = 19(1). 8 C.J.S. Bailments §§ 1, 2, 14, 15, 22; 86 C.J.S. Tender § 52 et seq.

- **58-429.** (7452) **What excuses performance, etc.** The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:
- 1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse;
- 2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary; or,
- 3. When the debtor is induced not to make it, by any act of the creditor intended or naturally tending to have that effect, done at or before the time at which such performance or offer may be made, and not rescinded before that time.

History: En. Sec. 2050, Civ. C. 1895; re-en. Sec. 4950, Rev. C. 1907; re-en. Sec. 7452, R. C. M. 1921. Cal. Civ. C. Sec. 1511. Field Civ. C. Sec. 727.

Applicable in Action for Negligence

In action for damages caused by flood waters on ground defendant railroad negligently maintained an embankment and bridge inadequate to let the waters escape, where evidence indicated the flood constituted an act of God, the defendant was excused under this section. Wibaux Realty Co. v. Northern Pacific Ry. Co., 101 M 126, 149, 54 P 2d 1175.

An act of God such as to excuse performance under this section is an unusual or unprecedented happening or event arising within the realm of natural law, but beyond and outside of the observations and experience of the average person. Wibaux Realty Co. v. Northern Pacific Ry. Co., 101 M 126, 149, 54 P 2d 1175.

Contract for Purchase of Ranch

A contract for the sale of a ranch on an installment plan provided for a down payment and then ten annual payments at five per cent interest, possession April 1, 1954. Sellers remained in possession and operated the ranch until April 1960. The purchaser did not tender the various amounts due except as to the "binder" payment. He was in effect borrowing the deferred payments at five per cent interest. Having received the reasonable rental value of the property the purchaser must stand a reduction of the amount of interest due under the contract on all payments over the down payment of twenty-nine per cent for the time they were due. Hughes v. Melby, — M —, 362 P 2d 1014, 1018, 1020.

Nonperformance Excused

Notwithstanding provision in contract that seller was to be wholly discharged of liability under warranty in case buyer failed to pay for goods ordered, if the failure to pay was caused by action of plaintiff, as where price was to be paid out of advances on government contract and government contract was lost because of defective condition of goods, nonperformance was excused. Pioneer Engineering Works v. McConnell, 123 M 171, 212 P 2d 641.

Collateral References

Contracts \bigcirc 303 and other particular topics.

17 C.J.S. Contracts §§ 459 et seq., 513. 12 Am. Jur. 925, Contracts, §§ 359-384.

58-430. (7453) Effect of prevention of performance. If the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties.

History: En. Sec. 2051, Civ. C. 1895; re-en. Sec. 4951, Rev. C. 1907; re-en. Sec. 7453, R. C. M. 1921. Cal. Civ. C. Sec. 1512. Field Civ. C. Sec. 728.

Operation and Effect

An unconditional offer in good faith to perform by the party on whom the obligation rests, coupled with the ability to perform, is, if rejected by the other party, equivalent to full performance, and extinguishes such obligation; the offerer is then entitled to all the benefits he would have been entitled to if performance had been complete on both sides. Lehrkind v. McDonnell, 51 M 343, 350, 153 P 1012.

Collateral References

12 Am. Jur. 957, Contracts, § 381.

58-431. (7454) Same—ratable portion of consideration, when. If performance of an obligation is prevented by any cause excusing performance, other than the act of the creditor, the debtor is entitled to a ratable proportion of the consideration to which he would have been entitled upon full performance, according to the benefit which the creditor receives from the actual performance.

History: En. Sec. 2052, Civ. C. 1895; re-en. Sec. 4952, Rev. C. 1907; re-en. Sec. 7454, R. C. M. 1921. Cal. Civ. C. Sec. 1514.

58-432. (7455) Effect of refusal to accept performance before offer. A refusal by a creditor to accept performance, made before an offer thereof, is equivalent to an offer and refusal, unless, before performance is actually due, he gives notice to the debtor of his willingness to accept it.

History: En. Sec. 2053, Civ. C. 1895; re-en. Sec. 4953, Rev. C. 1907; re-en. Sec. 7455, R. C. M. 1921. Cal. Civ. C. Sec. 1515. Field Civ. C. Sec. 731.

Collateral References

Contracts \$\sim 304\$ and other particular topics.

17 C.J.S. Contracts § 490 et seq. 12 Am. Jur. 959, Contracts, § 382.

CHAPTER 5

EXTINCTION OF OBLIGATIONS BY ACCORD AND SATISFACTION, NOVATION AND RELEASE

Section 58-501. Accord defined.

58-502. Effect of accord.

58-503. Satisfaction, what constitutes.

58-504. Part performance. 58-505. Novation defined.

58-506. Modes of novation. 58-507. Novation a contract.

58-507. Novation a contract. 58-508. Rescission of novation.

58-509. Obligation extinguished by release.

58-510. Certain claims not affected by general release.

58-511. Release of one of several joint debtors.

58-501. (7456) **Accord defined.** An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled.

History: En. Sec. 2060, Civ. C. 1895; re-en. Sec. 4954, Rev. C. 1907; re-en. Sec. 7456, R. C. M. 1921. Cal. Civ. C. Sec. 1521. Based on Field Civ. C. Sec. 732.

"Accord and Satisfaction" Defined

"Accord and satisfaction" means the substitution of a new agreement in satisfaction of an obligation different from the original rights existing under an antecedent liability, and to be available in defense must be specially pleaded. Nelson v. Young, 70 M 112, 117, 224 P 237.

Defense of Accord and Satisfaction

The defense of accord and satisfaction must be pleaded, and to constitute acceptance by mortgagee of a check for a less amount than was actually due from the mortgagor on accord, there must have been an agreement on the part of the mortgagee

to accept less in satisfaction in full of the mortgage. Nett v. Stockgrowers' Finance Corp., 84 M 116, 129, 274 P 497.

Distinction between "Compromise and Settlement" and "Accord and Satisfaction"

Distinctions drawn between "compromise and settlement" and "accord and satisfaction"—terms in many cases used interchangeably—seem to be of little practical importance, the intention of the parties in making the agreement in either instance and the effect given by statute to it being the controlling factors. Barbarich v. Chicago, M., St. P. & P. R. Co., 92 M 1, 12, 9 P 2d 797.

Evidence of Accord

In action against landlord, where tenant alleged that he had given verbal notice, accepted by the landlord, of his intention

to renew lease and had paid consideration therefor, and landlord alleged that consideration was for subsequent agreement which landlord asserted was an accord and satisfaction which allowed tenant time to remove property from premises, there was ample evidence from which the jury could determine that the defendant had breached one or more provisions of the accord. Flint v. Mincoff, 137 M 549, 353 P 2d 340, 344.

"Obligation" Defined

An "obligation" within the meaning of this section, defining an "accord" as an agreement, in extinction of an obligation, to accept something different from or less than that to which the party agreeing to accept is entitled, includes a liability for actionable tortious conduct. Barbarich v. Chicago, M., St. P. & P. R. Co., 92 M 1, 12, 9 P 2d 797.

What Does Not Constitute Accord and Satisfaction

To constitute acceptance by a creditor of a smaller amount than that claimed by him to be due on an accord and satisfaction, there must be a bona fide dispute between the parties with respect to the amount due; and if plaintiff accepted weekly pay for an amount less than he claimed to be due, laboring under the impression that eventually his employer would make up the difference as he promised, and con-tinued to work until he learned the promise would not be kept, the jury could not logically find that he was bound to know that his acceptance of the pay constituted an accord and satisfaction, i.e., a compromise. Jensen v. Cloud, 107 M 593, 598, 88 P 2d 36.

References

State ex rel. Bishop v. Keating, 56 M 526, 185 P 706; Hale v. Belgrade Co., 75 M 99, 114, 242 P 425; Gerard v. Sanner, 110 M 71, 77, 103 P 2d 314.

Collateral References

Accord and Satisfaction 1.

1 C.J.S. Accord and Satisfaction §§ 1-3,

5, 6, 17-19, 21, 24. 1 Am. Jur. 215, Accord and Satisfaction, § 1.

58-502. (7457) **Effect** of accord. Though the parties to an accord are bound to execute it, yet it does not extinguish the obligation until it is fully executed.

History: En. Sec. 2061, Civ. C. 1895; re-en. Sec. 4955, Rev. C. 1907; re-en. Sec. 7457, R. C. M. 1921. Cal. Civ. C. Sec. 1522. Field Civ. C. Sec. 733.

Accord and Satisfaction-Suit on Quantum Meruit

Where plaintiff agreed to accept stock in lieu of wages if defendant desired, if stock not delivered and agreement breached, he is not restricted to remedy of specific performance on breach of the agreement, or to an action for damages for the breach, but may treat agreement ended and sue upon quantum meruit. Davis v. Sullivan Gold Mining Co., 103 M 452, 455, 456, 457, 62 P 2d 1292.

Obligation Not Extinguished

Under this section and section 58-503, an accord does not extinguish the obligation sought to be extinguished until the agreement between the parties is fully executed, i.e., in case of a tort, until the injured party has accepted the consideration for the accord; until then the original obligation remains. Barbarich v. Chicago, M., St. P. & P. R. Co., 92 M 1, 13, 9 P 2d 797.

Collateral References

Accord and Satisfaction = 16, 17, 23. 1 C.J.S. Accord and Satisfaction §§ 1, 36, 38, 45.

1 Am. Jur. 255, Accord and Satisfaction, §§ 72, 73.

58-503. (7458) Satisfaction, what constitutes. Acceptance by the creditor of the consideration of an accord extinguishes the obligation, and is called satisfaction.

History: En. Sec. 2062, Civ. C. 1895; re-en. Sec. 4956, Rev. C. 1907; re-en. Sec. 7458, R. C. M. 1921. Cal. Civ. C. Sec. 1523. Field Civ. C. Sec. 734.

"Accord and Satisfaction" Defined

"Accord and satisfaction" means the substitution of a new agreement in satisfaction of an obligation, different from the original rights existing under an antecedent liability. Hale v. Belgrade Co., 75 M 99, 114, 242 P 425.

Extinguishment of Obligation

Under section 58-502 and this section, an accord does not extinguish the obligation sought to be extinguished until the agreement between the parties is fully executed, i.e., in case of a tort, until the injured party has accepted the consideration for the accord; until then the original obligation remains. Barbarich v. Chicago, M., St. P. & P. R. Co., 92 M 1, 13, 9 P 2d 797.

Pledge Ineffective When Obligation Paid

Where an obligation for which a pledge was given no longer exists, the pledge arrangement is no longer effective, even though the agreement was that the pledge should remain in force though the obligation be discharged, the payment of the

obligation in effect amounting to an accord and satisfaction. Gerard v. Sanner, 110 M 71, 77, 103 P 2d 314.

References

State ex rel. Bishop v. Keating, 56 M 526, 185 P 706; Nelson v. Young, 70 M 112, 117, 224 P 237.

Collateral References

1 Am. Jur. 215, Accord and Satisfaction, 8 1.

58-504. (7459) **Part performance.** Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation.

History: En. Sec. 2063, Civ. C. 1895; re-en. Sec. 4957, Rev. C. 1907; re-en. Sec. 7459, R. C. M. 1921, Cal. Civ. C. Sec. 1524.

Endorsement of Check

Where a claim is liquidated, i.e., ascertained and agreed upon by the parties, it can be discharged only by payment in full or by a payment of a lesser amount and acceptance thereof in writing (this section) and the bare endorsement of a check for the purpose of cashing it, given the creditor by the debtor, is not the writing contemplated by this section as evidence

58-505. (7460) Novation defined.

History: En. Sec. 2070, Civ. C. 1895; re-en. Sec. 4958, Rev. C. 1907; re-en. Sec. 7460, R. C. M. 1921. Cal. Civ. C. Sec. 1530. Field Civ. C. Sec. 736.

obligation for an existing one.

Burden of Proof

Where a renewal of a note has been given, it will not be treated as payment of the debt or a discharge of the original obligation, unless there is an affirmative showing that its execution constituted a novation. First Nat. Bank v. Cottonwood Land Co., 51 M 544, 550, 154 P 582.

In an action on promissory notes the defense to which was novation, the defendant had the burden of proving that the payee bank agreed to release him from all liability on the notes, to accept the alleged new debtor as its debtor instead of defendant, that the alleged new debtor agreed to pay the bank the amount owing upon the notes, and that the defendant to whom the new debtor was indebted released the latter from payment of an amount equal to the total due on the notes. First State Bank v. Larsen, 65 M 404, 411, 211 P 214. See also Kenison v. Anderson, 83 M 430, 272 P 679.

of acceptance of a lesser amount for that claimed to be due. Sawyer v. Somers Lumber Co., 86 M 169, 177, 282 P 852.

References

State ex rel. Bishop v. Keating, 56 M 526, 185 P 706.

Collateral References

Contracts €= 319.

17 C.J.S. Contracts §§ 393, 490 et seq., 515.

1 Am. Jur. 235, Accord and Satisfaction, §§ 37 et seq.

Novation is the substitution of a new

Essentials

To constitute a novation by substitution of a new debtor for an old one with intent to release the latter, there must be a mutual agreement between the three parties, the creditor must have consented to the discharge of the original debtor and accepted the promise of the new one, and such consent and acceptance need not necessarily be shown by express words to that effect but may be implied from the facts and circumstances attending the transaction and the conduct of the parties thereafter. Kenison v. Anderson, 83 M 430, 272 P 679.

Novation, like any other valid contract, must be supported by a consideration, which may be the discharge of the original debt or the release of the original debtor, and may be proved by parol. Kenison v. Anderson, 83 M 430, 272 P 679.

Where one is already legally bound by his contract (a note) to perform an obligation, a later agreement (a new note) for the same consideration, modifying the former one, does not effect a novation. Bose v. Sullivan. 87 M 476, 479, 288 P 614.

In determining whether or not a nova-

tion was brought about by the substitution of a new debtor in place of the old one, the intent to release the original debtor is of vital importance; there must have been a clear and definite intention on the part of all concerned in that behalf, since novation is never to be presumed. Harrison v. Fregger, 88 M 448, 453, 294 P 372.

Fregger, 88 M 448, 453, 294 P 372.

Novation is effected by contract, and to bring it about there must be the following essentials: A previous valid obligation; the agreement of all the parties to the new contract; the extinguishment of the old, and the validity of the new contract. Tannhauser v. Shea, 88 M 562, 566, 295 P 268, 74 ALR 1021.

Novation and Assignment Distinguished

In novation the obligation between the original parties to the contract is completely extinguished and a new obligation between the transferee and obligator is created and substituted for the previous one; while in case of assignment of the contract, the obligation of the original debtor continues to rest upon him and he may be compelled to respond to the obligee in the event of the default of the assignee. Harrison v. Fregger, 88 M 448, 453, 294 P 372.

Plaintiffs leased business property to one who covenanted to pay rent for the full term of 6½ years but thereafter assigned the lease to another who in turn subleased it to a third person, all with the consent of the lessors. Contention of defendant (the original lessee), in an action for rent, that novation resulted from his assignment of the lease with the consent of lessors, their acceptance of the rent from the assignee and their recognition of the latter's right to sublease, was unavailing, where it was not apparent that acts of plaintiff were inconsistent with their intention to continue to look to defendant for rent in case of default of his assignee. Harrison v. Fregger, 88 M 448, 453, 294 P 372.

Partial Novation

Where a subcontractor assigned a portion of the moneys to become due under his contract with defendant, and defendant accepted the assignment, the transaction constituted a novation to the extent of the amount of money assigned; the plaintiff became the creditor of defend-

ant, and the rights and remedies of the parties were determinable under the contract of novation. Silver v. Morin, 74 M 398, 401, 240 P 825.

Pleading Novation

In pleading a novation the plaintiff must allege the following essential elements: A previous valid obligation; the agreement of all the parties to the new contract; the extinguishment of the old one, and the validity of the new one; the question whether the facts alleged constitute a novation being one of law for the court's decision. Kirkup v. Anaeonda Amusement Co., 59 M 469, 489, 197 P 1005, 17 ALR 441.

Novation is an affirmative defense; it constitutes new matter which must be specially pleaded; it is made by contract and is subject to all the rules concerning contracts in general; it must be supported by a consideration. Bose v. Sullivan, 87 M 476, 479, 288 P 614.

Statute of Frauds

Where a promise is made to pay the antecedent obligation of another upon the condition that the party receiving it will cancel the obligation, accepting the new promise in substitution therefor, it is an original undertaking or agreement and not a mere promise to answer for the debt of another within the meaning of the statute of frauds, and need not be in writing. Tannhauser v. Shea, 88 M 562, 566, 295 P 268, 74 ALR 1021.

What Are Subjects of Novation

Judgments are as much the subjects of novation as simple contract debts. Tannhauser v. Shea, 88 M 562, 566, 295 P 268, 74 ALR 1021.

References

McAllister v. McDonald, 40 M 375, 387, 106 P 882; Kinsman v. Stanhope, 50 M 41, 47, 144 P 1083.

Collateral References

Novation \$ 1. 66 C.J.S. Novation § 1. 39 Am. Jur. 254, Novation, § 2.

Creditors' acceptance of obligation of third person as constituting novation, 61 ALR 2d 755.

58-506. (7461) **Modes of novation.** Novation is made:

- 1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation;
- 2. By the substitution of a new debtor in place of the old one, with intent to release the latter; or,
- 3. By the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former.

History: En. Sec. 2071, Civ. C. 1895; re-en. Sec. 4959, Rev. C. 1907; re-en. Sec. 7461, R. C. M. 1921. Cal. Civ. C. Sec. 1531. Field Civ. C. Sec. 737.

Agreements Constituting a Novation

Where the purchaser of a building had agreed with the seller immediately upon completion of the sale, and with plaintiff, that he would assume a debt due the latter from the seller for a lighting plant installed by him in the building prior to the sale, the transaction amounted to a "novation" within the meaning of subdivision 2 of this section, rendering the purchaser liable on the obligation assumed by him. Sullivan v. Marshall, 56 M 568, 187 P 1013.

From his acceptance of a new note from defendants for the one executed by their father, a novation resulted which barred plaintiff payee from thereafter enforcing the trust which he might otherwise have relied upon to secure payment of the original note. Larsen v. Marcy, 61 M 1, 7, 201 P 685.

Where a remodeling contract was assigned to the contracting company's manager who was superintending the work and paid all bills presented even though charged to the company, the owner consenting to the substitution, a novation resulted under this section, and the owner was in no position, in a mechanic's and materialmen's lien foreclosure action to question the assignee's right to include in his claim money expended for labor and materials on the property before the assignment, but was estopped from denying that the assignee was the original contractor. Smith v. Gunniss, 115 M 362, 380, 144 P 2d 186.

Agreements Not Constituting a Novation

Where a man buys an automobile, giving a chattel mortgage to secure unpaid purchase money, but afterward a new agreement is made, whereby the purchaser is to run the machine for hire, the seller paying expenses and the buyer to turn over to the seller all moneys received until the balance due on the machine is paid, such agreement does not effect a novation; it does not extinguish the debt. Kinsman v. Stanhope, 50 M 41, 47, 144 P 1083.

Where complaint failed to allege either that defendant company agreed that the contract claimed to have been made with its promoters should be its own, with the understanding that the original obligor should be released, or that it adopted or agreed to carry out the terms and conditions of the contract in substitution of the original obligor, agreed to by the parties to the original contract, it did not state a cause of action in novation. Kirkup v. Anaconda Amusement Co., 59 M 469, 197 P 1005, 17 ALR 441.

In an action for rent, held, that where plaintiffs leased business property to one who covenanted to pay rent for the full term of six and a half years and thereafter assigned the lease to another, he in turn subleasing to a third, all with the consent of the lessors, the contention of defendant (original lessee) that a novation resulted from his assignment of the lease with the consent of lessors, their acceptance of the rent from the assignee and their recognition of the latter's right to sublease, may not be upheld, nothing appearing from the acts of plaintiffs enumerated inconsistent with their intention to continue to look to defendant for the rent in case of default of his assignee. Harrison v. Fregger, 88 M 448, 453, 294 P 372.

General Essential

In an action on promissory notes the defense to which was novation, the defendant had the burden of proving that the payee bank agreed to release him from all liability on the notes, to accept the alleged new debtor as its debtor instead of defendant, that the alleged new debtor agreed to pay the bank the amount owing upon the notes, and that the defendant to whom the new debtor was indebted released the latter from payment of an amount equal to the total due on the notes. First State Bank v. Larsen, 65 M 404, 411, 211 P 214.

Substitution of New Debtor for Old

To constitute a novation by the substitution of a new debtor in place of the original one, there must be a mutual agreement to that effect between the parties. The assent to, and acceptance of, the terms of novation may be implied from the facts and circumstances attending the transaction, and the conduct of the parties thereafter, and in determining whether a novation took place, the intent, on the part of the creditor, to release the original debtor from his obligation, is of vital importance. McAllister v. McDonald, 40 M 375, 387, 106 P 882.

To constitute a novation by substitution of a new debtor for an old one with intent to release the latter, there must be a mutual agreement between the three parties, the creditor must have consented to the discharge of the original debtor and accepted the promise of the new one, and such consent and acceptance need not necessarily be shown by express words to that effect but may be implied from the facts and circumstances attending the transaction and the conduct of the parties thereafter. Kenison v. Anderson, 83 M 430, 272 P 679.

References

First Nat. Bank v. Cottonwood Land Co., 51 M 544, 550, 154 P 582; Tannhauser v. Shea, 88 M 562, 567, 295 P 268, 74 ALR 1021.

66 C.J.S. Novation §§ 1, 9 et seq., 15 et seq.

39 Am. Jur. 256, Novation, § 4.

Collateral References

Novation € 1-9.

58-507. (7462) **Novation a contract.** Novation is made by contract, and is subject to all the rules concerning contracts in general.

History: En. Sec. 2072, Civ. C. 1895; re-en. Sec. 4960, Rev. C. 1907; re-en. Sec. 7462, R. C. M. 1921. Cal. Civ. C. Sec. 1532. Field Civ. C. Sec. 738.

Consideration Essential

A novation, like other valid contracts, must be supported by a consideration, which may be the discharge of the original debt or the release of the original debtor. Proof of novation may be by parol. Kenison v. Anderson, 83 M 430, 438, 272 P 679. See also Bose v. Sullivan, 87 M 476, 479, 288 P 614.

Mutual Agreement between Parties

To constitute a novation by substitution of debtors, there must be a mutual agreement between the three (or more) parties involved and "the creditor must have consented to the discharge of the original debtor and have accepted the promise of

the new debtor. It is not essential that the assent to and acceptance of the terms of novation be shown by express words to that effect, but the same may be implied from the facts and circumstances attending the transaction and the conduct of the parties thereafter." McAllister v. McDonald, 40 M 375 106 P 882; First State Bank v. Larsen, 65 M 404, 411, 211 P 214; Silver v. Morin, 74 M 398, 401, 240 P 825; Kenison v. Anderson, 83 M 430, 438, 272 P 679.

References

Kirkup v. Anaconda Amusement Co., 59 M 469, 489, 197 P 1005, 17 ALR 441; Tannhauser v. Shea, 88 M 562, 567, 295 P 268, 74 ALR 1021.

Collateral References

Novation 1, 10. 66 C.J.S. Novation 3 et seq.

58-508. (7463) Rescission of novation. When the obligation of a third person, or an order upon such person, is accepted in satisfaction, the creditor may rescind such acceptance if the debtor prevents such person from complying with the order, or from fulfilling the obligation; or if, at the time the obligation or order is received, such person is insolvent, and the fact is unknown to the creditor; or if, before the creditor can with reasonable diligence present the order to the person upon whom it is given, he becomes insolvent.

History: En. Sec. 2073, Civ. C. 1895; re-en. Sec. 4961, Rev. C. 1907; re-en. Sec. 7463, R. C. M. 1921. Cal. Civ. C. Sec. 1533. Based on Field Civ. C. Sec. 740.

Collateral References

Novation 9. 66 C.J.S. Novation § 23.

58-509. (7464) **Obligation extinguished by release.** An obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without new consideration.

History: En. Sec. 2080, Civ. C. 1895; re-en. Sec. 4962, Rev. C. 1907; re-en. Sec. 7464, R. C. M. 1921. Cal. Civ. C. Sec. 1541. Based on Field Civ. C. Sec. 741.

Collateral References

Release ≈38-40. 76 C.J.S. Release §§ 40, 51. 45 Am. Jur. 691, Release, §§ 26 et seq.

58-510. (7465) Certain claims not affected by general release. A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which, if known by him, must have materially affected his settlement with the debtor.

History: En. Sec. 2081, Civ. C. 1895; 7465, R. C. M. 1921. Cal. Civ. C. Sec. 1542. re-en. Sec. 4963, Rev. C. 1907; re-en. Sec. Based on Field Civ. C. Sec. 742.

58-511. (7466) Release of one of several joint debtors. A release of one of two or more joint debtors does not extinguish the obligation of any of the others, unless they are mere guarantors; nor does it affect their rights to contribution from him.

History: En. Sec. 2082, Civ. C. 1895; re-en. Sec. 4964, Rev. C. 1907; re-en. Sec. 7466, R. C. M. 1921. Cal. Civ. C. Sec. 1543. Field Civ. C. Sec. 743.

Comparison with Rule on Joint Tort-feasors

Where plaintiff compromised an action against the sheriff for false arrest and imprisonment by defendants paying him \$1,000 and he executing a release captioned "Release in full of all claims," reciting that he accepted said sum as "complete compensation for all injuries sustained in connection with" the matters set forth in the complaint, then sued the county attorney who set up the release as a bar, and the court properly sustained defendant's motion for judgment on the pleadings and dismissed the action, as against the contention that tort liability was governed by our statutes on joint debtors, held, that even if applicable, the release would operate the same. Beedle v. Carolan, 115 M 587, 590, 148 P 2d 559.

References

Barbarich v. Chicago, M., St. P. & P. R. Co., 92 M 1, 12, 9 P 2d 797.

Collateral References

Release 28.

76 C.J.S. Release § 49.

13 Am. Jur. 1 et seq., Contribution; 45 Am. Jur. 697, Release, §§ 33 et seq.

Release of mortgagor (or intermediate grantee who has assumed the mortgage) by subsequent dealings between his grantee and mortgagee. 41 ALR 277; 72 ALR 389; 81 ALR 1016 and 112 ALR 1324.

Release of one of several joint or joint and several contract obligors as affecting liability of other obligors. 53 ALR 1420.

Oral agreements between joint obligors as to extent of liability inter se. 65 ALR 822.

Release of one or more executors, administrators, or testamentary trustees as release of other or others. 116 ALR 1163.

CHAPTER 6

OBLIGATIONS IMPOSED BY LAW

Section 58-601. Abstinence from injury.

58-602. Fraudulent deceit.

58-603. Deceit—acts constituting. 58-604. Deceit upon the public, etc.

58-605. Restoration of thing wrongfully acquired.

58-606. When demand necessary.

58-607. Responsibility for willful acts, negligence, etc.

58-608. Other obligations.

58-601. (7573) Abstinence from injury. Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights.

History: En. Sec. 2290, Civ. C. 1895; re-en. Sec. 5071, Rev. C. 1907; re-en. Sec. 7573, R. C. M. 1921. Cal. Civ. C. Sec. 1708. Field Civ. C. Sec. 847.

Breach Induced by Third Party

Where a stranger to a contract without justification induces a party thereto to break it, he is responsible in damages to the other party to it. Simonsen v. Barth, 64 M 95, 101, 208 P 938.

The parties to a contract cannot impose any liability upon a stranger to the contract under the terms of the contract, but "every person is bound, without contract to abstain from injuring the person or property of another, or infringing upon any of his rights" and every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money which is called damages (sec. 17-201). Thus the law independent of the contract, imposes upon stranger to the contract the duty not to interfere with its performance. The violation of this duty is a tort, the remedy for such interference is by action in tort and therefore statutory provisions, respecting the pleading of breach of a contract, have no application. Burden v. Elling State Bank, 76 M 24, 30, 245 P 958, 46 ALR 906.

Corporate Employee

Where employee of foreign corporation allegedly placed a crate of oranges in aisle of corporation's store resulting in injury to customer when he tripped over the crate, action against foreign corporation and its resident employee, who was joined as John Doe, was not served with process and did not appear, was not removable by corporation to federal court on ground of diversity of citizenship. Jensen v. Safeway Stores, Inc., 24 F Supp 585, 588.

Trespass

Where defendant had plaintiffs' permission to enter upon plaintiffs' lands for seismograph operations, and defendant, after protests by the plaintiff landowners, caused explosions which damaged a spring on the land, defendant was a trespasser ab initio and could be liable irrespective of negligence. Francis v. Sun Oil Co., 135 M 307, 340 P 2d 824.

Collateral References

Torts1. 86 C.J.S. Torts § 1 et seq.

58-602. (7574) **Fraudulent deceit.** One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.

History: En. Sec. 2291, Civ. C. 1895; re-en. Sec. 5072, Rev. C. 1907; re-en. Sec. 7574, R. C. M. 1921. Cal. Civ. C. Sec. 1709. Field Civ. C. Sec. 848.

Employment Contract

If a person sells a sheep business owned by him, in view of being subsequently employed as manager thereof, according to oral agreement, but the memorandum of sale does not contain any reference to his employment as manager, he cannot maintain an action for deceit; his consent to the writing completely superseded the prior oral negotiations, including the promise to employ him, and section 13-607 forbids him to say that there ever was any oral promise for his employment. Kelly v. Ellis, 39 M 597, 604, 104 P 873.

Property Acquired by Deceit

Under this section acquisition of another's property by deceit is illegal, and all acts done in furtherance of a purpose to so acquire it become tainted with the illegality, although if performed without the unlawful purpose in view, they might of themselves be innocent. Biering v. Ringling, 74 M 176, 196, 240 P 829.

References

Bump v. Geddes, 70 M 425, 431, 226 P 512; McIntyre v. Dawes, 71 M 367, 229 P 846.

Collateral References

Fraud ← 1-33. 37 C.J.S. Fraud § 3 et seq. 23 Am. Jur. 771, Fraud and Deceit, §§ 20 t seq.

58-603. (7575) **Deceit—acts constituting.** A deceit, within the meaning of the last section, is either:

- 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- 2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;
- 3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,
 - 4. A promise, made without any intention of performing it.

History: En. Sec. 2292, Civ. C. 1895; re-en. Sec. 5073, Rev. C. 1907; re-en. Sec. 7575, R. C. M. 1921. Cal. Civ. C. Sec. 1710. Field Civ. C. Sec. 849.

Burden of Proof

Where in an action for deceit the court had instructed the jury on what constituted deceit substantially in the words of this section, and advised them that if any one of the therein enumerated conditions was established, their verdict should be for plaintiff, and then followed it with an in-

struction that the burden was upon plaintiff to prove each of the material allegations of his complaint, the latter instruction held not erroneous as indicating that the verdict must be in favor of defendant unless plaintiff had proven each and all of the alleged false statements, whereas proof of any one of them was sufficient and error was not committed in not pointing out what were the material facts at issue, since the jury, in view of the whole charge, could hardly have been misled by the general language in the latter instruc-

tion. Russell v. Sunburst Refining Co., 83 M 452, 469 et seq., 272 P 998.

Sale of Dwelling

In an action against a building contractor to recover damages for fraud in the sale of a newly constructed dwelling house, held, under the facts presented that plaintiffs had a right to rely on the representations made by the vendor as they did, and verdict in their favor affirmed. Walker v. Hustad, 116 M 495, 497, 154 P 2d 483.

Suppression of Facts

Deceit or fraud may be negative as well as affirmative; it may consist of suppres-

sion of that which it is one's duty to declare, as well as in the declaration of that which is false. Bump v. Geddes, 70 M 425, 431, 226 P 512.

References

Kelly v. Ellis, 39 M 597, 604, 104 P 873; Equity Co-operative Assn. v. Equity Co-operative Milling Co., 63 M 26, 36, 206 P 349; McIntyre v. Dawes, 71 M 367, 229 P 846; Biering v. Ringling, 74 M 176, 196, 240 P 829.

Collateral References

Fraud € 1-28. 37 C.J.S. Fraud § 1 et seq.

58-604. (7576) Deceit upon the public, etc. One who practices a deceit with intent to defraud the public, or a particular class of persons, is deemed to have intended to defraud every individual in that class, who is actually misled by the deceit.

History: En. Sec. 2293, Civ. C. 1895; re-en. Sec. 5074, Rev. C. 1907; re-en. Sec. 7576, R. C. M. 1921, Cal. Civ. C. Sec. 1711. Field Civ. C. Sec. 850.

Collateral References

Fraud \$34, 29. 37 C.J.S. Fraud \$\ 22, 26, 60.

58-605. (7577) Restoration of thing wrongfully acquired. One who obtains a thing without the consent of its owner, or by a consent afterwards rescinded, or by an unlawful exaction which the owner could not at the time prudently refuse, must restore it to the person from whom it was thus obtained, unless he has acquired a title thereto superior to that of such other person, or unless the transaction was corrupt and unlawful on both sides.

History: En. Sec. 2294, Civ. C. 1895; re-en. Sec. 5075, Rev. C. 1907; re-en. Sec. 7577, R. C. M. 1921. Cal. Civ. C. Sec. 1712. Field Civ. C. Sec. 851.

Operation and Effect

Where a contract has been made to sell real estate and personal property, and possession has been given to the former and delivery made of the latter, but the purchaser repudiates the contract, and the vendor rescinds, the purchaser is bound, without demand, to restore to the vendor the personalty received, and to compensate him for the use and occupation of the land. Hicks v. Rupp, 49 M 40, 46, 140 P 97. See Hopkins v. Walker, 244 U S 486, 491, 61 L Ed 1270, 37 S Ct 711.

Restitution should be granted when to do otherwise would give offense to equity and good conscience, so, where plaintiff's attorneys had knowledge that there was some question as to whether the named defendant was the proper party defendant prior to the entry of a default judgment, which was later set aside, defendant was entitled to restitution of money seized under the default judgment. Waggoner v. Glacier Colony of Hutterites, 131 M 525, 312 P 2d 117, 119.

References

Stiemke v. Jankovich, 68 M 60, 62, 217 P 650.

Collateral References

Money Received ← 1 et seq.; Replevin ← 3-7; Trespass ← 1 et seq. 58 C.J.S. Money Received § 1 et seq.; 77

58 C.J.S. Money Received § 1 et seq.; 77 C.J.S. Replevin §§ 9 et seq., 25 et seq.; 87 C.J.S. Trespass § 1 et seq.

See 46 Am. Jur. 99, Restitution and Unjust Enrichment.

58-606. (7578) When demand necessary. The restoration required by the last section must be made without demand, except where a thing is obtained by mutual mistake, in which case the party obtaining the thing is not bound to return it until he has notice of the mistake.

History: En. Sec. 2295, Civ. C. 1895; 7578, R. C. M. 1921. Cal. Civ. C. Sec. 1713. re-en. Sec. 5076, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 852.

References

Hicks v. Rupp, 49 M 40, 46, 140 P 97; Stiemke v. Jankovich, 68 M 60, 62, 217 P 650.

Collateral References

Money Received €=11; Replevin €=11. 58 C.J.S. Money Received § 26; 77 C.J.S. Replevin § 64 et seq.

58-607. (7579) Responsibility for willful acts, negligence, etc. Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the title on compensatory relief.

History: En. Sec. 2296, Civ. C. 1895; re-en. Sec. 5077, Rev. C. 1907; re-en. Sec. 7579, R. C. M. 1921. Cal. Civ. C. Sec. 1714. Based on Field Civ. C. Sec. 853.

Corporate Employee

Where employee of foreign corporation allegedly placed a crate of oranges in aisle of corporation's store resulting in injury to customer when he tripped over the crate, action against foreign corporation and its resident employee, who was joined as John Doe, was not served with process and did not appear, was not removable by corporation to federal court on ground of diversity of citizenship. Jensen v. Safeway Stores, Inc., 24 F Supp 585, 588.

Proximate Cause of Loss

One who has been proximately the cause of loss or injury to himself cannot be heard to say that someone else should compensate him for his loss, even though such other person had brought about the condition, in the order of causation, which produced the injury. This is the rule declared in the above section. County of

Silver Bow v. Davies, 40 M 418, 431, 107 P 81.

Want of Ordinary Care

If error was committed by instructing the jury in a personal injury action, substantially in the words of this section, that a person is responsible for an injury occasioned to another by his want of ordinary care or skill, etc., objected to as declaring that defendant was responsible for the injuries sustained by plaintiff, it was cured by an instruction that the court was not to be understood as intimating that defendant in what he did was negligent. Mellon v. Kelly, 99 M 10, 25, 41 P 2d 49.

References

Beinhorn v. Griswold, 27 M 79, 90, 69 P 557; Simonsen v. Barth, 64 M 95, 100, 208 P 938; State ex rel. Case v. Bolles, 74 M 54, 66, 238 P 586.

Collateral References

Negligence ≈1 et seq. 65 C.J.S. Negligence § 2 et seq.

58-608. (7580) **Other obligations.** Other obligations are prescribed in Titles 5, 7, 9, 10, 14, 15, 21, 22, 29, 33, 36, 39, 40, 48, 61, 64, 67, 70, 72, 73, 86, 88, 89, 91.

History: En. Sec. 2297, Civ. C. 1895; re-en. Sec. 5078, Rev. C. 1907; re-en. Sec. 7580, R. C. M. 1921, Cal. Civ. C. Sec. 1715. Field Civ. C. Sec. 854.

Collateral References

Sales € 1-8.
77 C.J.S. Sales §§ 6, 21, 63.

46 Am. Jur. 198, Sales, §§ 1 et seq.; 55 Am. Jur. 473, Vendor and Purchaser, §§ 1 et seq.

TITLE 59

OFFICES AND OFFICERS

1. Chapter Classification of public officers, 59-101.

Executive officers—classification and election, 59-201 to 59-203. 2.

3. Disqualifications and restrictions, 59-301 to 59-308.

- Appointments, nomination and oath of office, 59-401 to 59-418. 4.
- Prohibitions and general provisions applicable to public officers, 59-501 to 5. 59-542.
- Resignations and vacancies, 59-601 to 59-608. 6.

7. The fiscal year—official reports, 59-701 to 59-708.

8.

Mileage of public officers, 59-801, 59-802. State board of examiners to fix number, salary and term of assistants to 9. state officers, 59-901, 59-902

Vacations of employees, 59-1001 to 59-1007. 10.

Federal Social Security Act—coverage of certain officers and employees, 11. 59-1101 to 59-1113.

Personnel administration law, 59-1201 to 59-1215.

Facsimile signatures of public officials, 59-1301 to 59-1306. 13.

CHAPTER 1

CLASSIFICATION OF PUBLIC OFFICERS

Section 59-101. Classification of public officers.

59-101. (50) Classification of public officers. The public officers of this state are classified as follows:

- 1. Legislative.
- 2. Executive.
- 3. Judicial.
- Ministerial officers and officers of the courts.

But this classification is not to be construed as defining the legal powers of either class.

History: En. Sec. 140, Pol. C. 1895; re-en. Sec. 49, Rev. C. 1907; re-en. Sec. 50, R. C. M. 1921. Cal. Pol. C. Sec. 220.

Cross-Reference

Salaries, sec. 25-501 et seq.

Collateral References

Constitutional Law 50 et seg., 67 et

seq., 76 et seq.
16 C.J.S. Constitutional Law § 104 et seq.

CHAPTER 2

EXECUTIVE OFFICERS—CLASSIFICATION AND ELECTION

Section 59-201. Classification of executive officers.

59-202. Military omcers. 59-203. Certain officers, how elected.

59-201. (109) Classification of executive officers. Executive officers are either:

- 1. Civil; or,
- Military.

History: En. Sec. 330, Pol. C. 1895; re-en. Sec. 125, Rev. C. 1907; re-en. Sec. 109, R. C. M. 1921. Cal. Pol. C. Sec. 341.

Collateral References

States 244.

81 C.J.S. States § 54 et seq.

59-202. (110) Military officers. Military officers are designated and their duties prescribed in Title 77.

History: En. Sec. 331, Pol. C. 1895; re-en. Sec. 126, Rev. C. 1907; re-en. Sec. 110, R. C. M. 1921. Cal. Pol. C. Sec. 342.

Collateral References Militia€=7. 57 C.J.S. Militia § 11 et seq.

59-203. (111) Certain officers, how elected. The mode of election of the governor, lieutenant-governor, secretary of state, state auditor, state treasurer, attorney general and superintendent of public instruction is prescribed by the constitution.

History: En. Sec. 340, Pol. C. 1895; re-en. Sec. 128, Rev. C. 1907; re-en. Sec. 111, R. C. M. 1921. Cal. Pol. C. Sec. 348.

Collateral References States 341, 42, 46, 81 C.J.S. States § 68 et seq.

CHAPTER 3

DISQUALIFICATIONS AND RESTRICTIONS

Section 59-301. Age and citizenship. 59-302. Other disqualifications.

59-303. 59-304. County officers not to act as deputies of other officers, except when.

Certain officers must reside at the seat of government.

59-305. Absence from the state.

59-306. Restrictions upon judicial officers.

59-307. Restrictions upon county officers.

59-308. Restrictions upon other officers.

59-301. (410) **Age and citizenship.** No person is capable of holding a civil office in this state, who at the time of his election or appointment is not of the age of twenty-one years and a citizen of this state.

History: En. Sec. 960, Pol. C. 1895; re-en. Sec. 342, Rev. C. 1907; re-en. Sec. 410, R. C. M. 1921. Cal. Pol. C. Sec. 841.

State ex rel. Flynn v. Ellis, 110 M 43, 48, 98 P 2d 879.

Collateral References

Officers 18, 21.

67 C.J.S. Officers §§ 13, 17. 42 Am. Jur. 907, Public Officers, §§ 37 et seq.

59-302. (411) **Other disqualifications.** Provisions respecting disqualifications for particular offices are contained in the constitution and in the provisions of the codes concerning the various offices.

History: En. Sec. 961, Pol. C. 1895; re-en. Sec. 343, Rev. C. 1907; re-en. Sec. 411, R. C. M. 1921. Cal. Pol. C. Sec. 842.

Cross-Reference

Conviction for bribery as forfeiture or disqualification for office, sec. 94-809.

59-303. (412) County officers not to act as deputies of other officers, **except when.** No county officer, under salary, must be appointed or act as deputy of another officer of the same county except in cases where the officer so appointed agrees to act and serve as such deputy without additional compensation.

History: En. Sec. 962, Pol. C. 1895; re-en. Sec. 344, Rev. C. 1907; re-en. Sec. 412, R. C. M. 1921; amd. Sec. 1, Ch. 21, L. 1925. Cal. Pol. C. Sec. 843.

Collateral References

Counties €== 64.

20 C.J.S. Counties §§ 102, 104.

References

State v. Rother, 130 M 357, 303 P 2d 393 at 401 (dissenting opinion).

59-304. (413) Certain officers must reside at the seat of government. The following officers must reside and keep their offices at the seat of government: The governor, secretary of state, state auditor, state treasurer, attorney general, superintendent of public instruction, justices of the supreme court, and elerk of the supreme court.

History: En. Sec. 970, Pol. C. 1895; re-en. Sec. 345, Rev. C. 1907; re-en. Sec. 413, R. C. M. 1921. Cal. Pol. C. Sec. 852.

Collateral References

States \$\infty 68.

81 C.J.S. States §§ 60, 63, 64, 65 et seq.

References

Gullickson v. Mitchell, 113 M 359, 364, 126 P 2d 1106.

59-305. (414) Absence from the state. No officer mentioned in the preceding section, and no officer appointed by the governor and confirmed by the senate, must absent himself from the state for more than sixty consecutive days, unless upon business of the state or with the consent of the legislative assembly.

History: En. Sec. 971, Pol. C. 1895; re-en. Sec. 346, Rev. C. 1907; re-en. Sec. 414, R. C. M. 1921. Cal. Pol. C. Sec. 853.

Implied Amendment

The legislature had the power to amend this section and section 59-602, subd. 6, as it did by enacting Ch. 47, Laws 1941 (77-701 et seq.), providing for officers' leave of absence, or for their temporary suspension or relief from duty during

military service, except in so far as the result would be violative of some provision of the Constitution such as Art. VIII, sec. 37, relating to judicial officers absenting themselves from the state for more than sixty consecutive days. Gullickson v. Mitchell, 113 M 359, 368, 126 P 2d 1106.

Collateral References

States \$\infty 68.

81 C.J.S. States §§ 60, 63, 64, 65 et seq.

59-306. (415) **Restrictions upon judicial officers.** Restrictions upon the residence of other judicial officers are contained in the constitution and Title 93.

History: En. Sec. 972, Pol. C. 1895; re-en. Sec. 347, Rev. C. 1907; re-en. Sec. 415, R. C. M. 1921. Cal. Pol. C. Sec. 854.

59-307. (416) Restrictions upon county officers. Restrictions upon the residence of county officers are contained within Title 16.

History: En. Sec. 973, Pol. C. 1895; re-en. Sec. 348, Rev. C. 1907; re-en. Sec. 416, R. C. M. 1921. Cal. Pol. C. Sec. 855.

59-308. (417) Restrictions upon other officers. Restrictions upon the residence of other officers are contained in the chapter relating to the respective officers.

History: En. Sec. 974, Pol. C. 1895; re-en. Sec. 349, Rev. C. 1907; re-en. Sec. 417, R. C. M. 1921.

CHAPTER 4

APPOINTMENTS, NOMINATION AND OATH OF OFFICE

Section 59-401. Appointments, when not otherwise provided for.

59-402. Deputies and subordinate officers.

59-403. Number of deputies.

59-404. Powers of deputies.

59-405. Term of office, when not prescribed.

59-406. Holding over until successor is qualified.

APPOINTMENTS

59-407. Nominations to senate must be in writing.

59-408. Resolution of concurrence.

Commissions by the governor. 59-409.

59-410. Form of commissions.

59-411. Other commissions.

59-412. Appointments of deputies, etc., how made.

59-413. Oath, form of.

59-414. Oath of the members of the legislature.

59-415. Time of filing oath.

Oath, before whom taken. 59-416. Oath of office, where filed. Oath of deputies and others. 59-417.

59-418.

59-401. (419) Appointments, when not otherwise provided for. Every officer, the mode of whose appointment is not prescribed by the constitution or statutes, must be appointed by the governor by and with the advice and consent of the senate.

History: En. Sec. 990, Pol. C. 1895; re-en. Sec. 351, Rev. C. 1907; re-en. Sec. 419, R. C. M. 1921. Cal. Pol. C. Sec. 875.

67 C.J.S. Officers § 29. 42 Am. Jur. 949, Public Officers, §§ 90 et seq.

Collateral References

Officers 6.

(420) Deputies and subordinate officers. All assistants, deputies, and other subordinate officers, whose appointments are not otherwise provided for, must be appointed by the officer or body to whom they are respectively subordinate.

History: En. Sec. 991, Pol. C. 1895; re-en. Sec. 352, Rev. C. 1907; re-en. Sec. 420, R. C. M. 1921. Cal. Pol. C. Sec. 876.

Cross-Reference

Appointing deputies for reward, penalty, sec. 94-3910.

Operation and Effect

Under this section and under section 16-2409, held, that a county attorney may appoint a deputy to serve without compensation and that such deputy may legally act in the name of his principal in the filing of informations and the prosecution of criminal actions. State v. Crouch, 70 M 551, 553, 227 P 818.

References

Jobb v. County of Meagher, 20 M 424, 51 P 1034; In re Hyde, 73 M 363, 366, 236 P 248.

Collateral References

Officers 47.

67 C.J.S. Officers § 149.

43 Am. Jur. 218, Public Officers, §§ 460 et seq.

59-403. (421) **Number of deputies.** When the number of such deputies or subordinate officers is not fixed by law, it is limited only by the discretion of the appointing power.

History: En. Sec. 992, Pol. C. 1895; re-en. Sec. 353, Rev. C. 1907; re-en. Sec. 421, R. C. M. 1921. Cal. Pol. C. Sec. 877.

References

Jobb v. County of Meagher, 20 M 424,

428, 51 P 1034; State v. Crouch, 70 M 551, 553, 227 P 818.

Collateral References

Officers@-47.

67 C.J.S. Officers § 149.

59-404. (418) **Powers of deputies.** In all cases not otherwise provided for, each deputy possesses the powers and may perform the duties attached by law to the office of his principal.

History: En. Sec. 980, Pol. C. 1895; re-en. Sec. 350, Rev. C. 1907; re-en. Sec. 418, R. C. M. 1921. Cal. Pol. C. Sec. 865.

Operation and Effect

Where a public officer is authorized to

appoint a deupty, the authority of the latter, unless otherwise limited, is commensurate with that of the appointing officer, and any act which the latter might do, the deputy may also do. State v. Crouch, 70 M 551, 554, 227 P 818. See also State v. Larson, 75 M 274, 276, 243 P 566.

References

Daly v. Kelley, 57 M 306, 187 P 1022.

Collateral References

Officers € 105. 67 C.J.S. Officers § 151.

Liability of clerk of court, county clerk or prothonotary, or surety on bond, for negligent or wrongful acts of deputies or assistants. 71 ALR 2d 1140.

59-405. (422) Term of office, when not prescribed. Every office of which the duration is not fixed by law is held at the pleasure of the appointing power.

History: En. Sec. 993, Pol. C. 1895; re-en. Sec. 354, Rev. C. 1907; re-en. Sec. 422, R. C. M. 1921. Cal. Pol. C. Sec. 878.

Deputy Sheriff

The authority of a deputy sheriff may be revoked at any time with or without cause and he holds no "term" of office. State ex rel. Rusch v. Board of County Commrs., 121 M 162, 191 P 2d 670, 671.

Officers

Deputies and assistants of county officers enumerated in section 25-603 are not county officers since they serve only at the will and pleasure of their respective principals, by virtue of the provisions of

this section. Adami v. County of Lewis and Clark, 114 M 557, 560, 138 P 2d 969.

Unemployment Compensation Commission

The term of office of the third member of the unemployment compensation commission is not fixed by section 87-117 and he therefore serves at the pleasure of the governor. State ex rel. Bonner v. District Court, 122 M 464, 206 P 2d 166, 175.

Collateral References

Officers ≈ 49, 50. 67 C.J.S. Officers § 42 et seq. 43 Am. Jur. 10, Public Officers, §§ 149 et seq.

59-406. (423) Holding over until successor is qualified. Every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified.

History: En. Sec. 994, Pol. C. 1895; re-en. Sec. 355, Rev. C. 1907; re-en. Sec. 423, R. C. M. 1921. Cal. Pol. C. Sec. 879.

Constitutional Provision

Under sec. 6, Article XVI, of the Constitution, the terms of office of municipal officers must not exceed two years. Under this section of the code, every officer must continue to discharge his duties, although his term has expired, until his successor has qualified. Held, that unless the term of office of such officers as fixed by statute is so plainly at odds with that prescribed by the constitutional provision above as to be wholly inconsistent with it, the statute should be upheld. State ex rel. Sandquist v. Rogers, 93 M 355, 362, 18 P 2d 617.

Public Policy

This provision is one usually found in the codes of the states, being based upon the requirements of public policy, which demands that if, from any cause, the new incumbent of an office fails to qualify, or if there has not been an election of any person, there should not be a vacancy in the office, and a consequent suspension of the public business. State ex rel. Neill v. Page, 20 M 238, 244, 50 P 719.

Resignations

This section is applicable only to a case where the term of office of an incumbent has expired; it does not refer to a case of vacancy caused by resignations. State ex rel. Neill v. Page, 20 M 238, 244, 50 P 719.

Vacancy in County Office

Where a vacancy occurs in a county office, the board of county commissioners has general power, and it is its duty, to exercise such power to prevent an intergenum in the office and the consequent suspension of the public business. Even though it may happen that the proper officer or authority may omit to call an election or cannot do so under the particular emergency, nevertheless the board need not by subsequent neglect or inaction permit the public business to be suspended, and upon the happening of either contingency the appointed incumbent, as temporary locum tenens, must perform the duties of the office until his successor has qualified, so that an interregnum can never happen in any public office. State ex rel. Rowe v. Kehoe, 49 M 582, 590, 144 P 162, explained in 118 M 594, 597, 168 P 2d 843.

References

State ex rel. Jones v. Foster, 39 M 583, 586, 104 P 860; Bailey v. Knight, 118 M 594, 168 P 2d 843, 844.

Collateral References

Officers 54.
67 C.J.S. Officers § 48.
43 Am. Jur. 10, Public Officers, §§ 149 et seq.

59-407. (424) **Nominations to senate must be in writing.** Nominations made by the governor to the senate must be in writing, designating the residence of the nominee and the office for which he is nominated.

History: En. Sec. 1000, Pol. C. 1895; re-en. Sec. 356, Rev. C. 1907; re-en. Sec. 424, R. C. M. 1921. Cal. Pol. C. Sec. 889.

Collateral References

Officers 33; States 46.
67 C.J.S. Officers 30 et seq.; 81 C.J.S. States 68 et seq.

59-408. (425) **Resolution of concurrence.** Whenever the senate concurs in a nomination, its secretary must immediately deliver a copy of the resolution of concurrence, certified by the president and secretary, to the secretary of state, and another copy, certified by the secretary, to the governor.

History: En. Sec. 1001, Pol. C. 1895; re-en. Sec. 357, Rev. C. 1907; re-en. Sec. 425, R. C. M. 1921. Cal. Pol. C. Sec. 890.

59-409. (426) **Commissions by the governor.** The governor must commission:

- 1. All officers elected by the people whose commissions are not otherwise provided for.
 - 2. All officers of the militia.
- 3. All officers appointed by the governor, or by the governor with consent of the senate.
 - 4. United States senators.

History: En. Sec. 1002, Pol. C. 1895; re-en. Sec. 358, Rev. C. 1907; re-en. Sec. 426, R. C. M. 1921. Cal. Pol. C. Sec. 891.

State Land Agent

Under this section, the state land agent should properly be commissioned by the governor. He is a state official appointed by the governor, ordinarily with the consent of the state land board; and it is in accord with the spirit of the law that such an official should bear a commission signed by the governor, as evidence of his ap-

pointment. State ex rel. Neill v. Page, 20 M 238, 245, 50 P 719.

References

State v. Rouleau, 68 M 529, 540, 219 P 1096; State ex rel. Barney v. Hawkins, 79 M 506, 518, 257 P 411, 53 ALR 583.

Collateral References

Officers 38.
67 C.J.S. Officers § 40.
42 Am. Jur., Public Officers, p. 951, § 93;
p. 964, §§ 115 et seq.

59-410. (427) **Form of commissions.** The commissions of all officers commissioned by the governor must be issued in the name of the state, and must be signed by the governor and attested by the secretary of state, under the great seal.

History: En. Sec. 1003, Pol. C. 1895; re-en. Sec. 359, Rev. C. 1907; re-en. Sec. 427, R. C. M. 1921. Cal. Pol. C. Sec. 892.

540, 219 P 1096; State ex rel. Barney v. Hawkins, 79 M 506, 518, 257 P 411, 53 ALR

References

State ex rel. Neill v. Page, 20 M 238, 243, 50 P 719; State v. Rouleau, 68 M 529,

Collateral References

42 Am. Jur. 966, Public Officers, § 119.

59-411. (428) **Other commissions.** The commissions of all other officers, where no special provision is made by law, must be signed by the presiding officer of the body or by the person making the appointment.

History: En. Sec. 1004, Pol. C. 1895; re-en. Sec. 360, Rev. C. 1907; re-en. Sec. 428, R. C. M. 1921. Cal. Pol. C. Sec. 893.

References

State v. Rouleau, 68 M 529, 540, 219

P 1096; State ex rel. Barney v. Hawkins, 79 M 506, 518, 257 P 411, 53 ALR 583.

Collateral References

42 Am. Jur. 964, Public Officers, §§ 115 et seq.

59-412. (429) Appointments of deputies, etc., how made. The appointment of deputies, clerks, and subordinate officers, when not otherwise provided for, must be made in writing filed in the office of the appointing power or the office of its clerk.

History: En. Sec. 1005, Pol. C. 1895; re-en. Sec. 361, Rev. C. 1907; re-en. Sec. 429, R. C. M. 1921. Cal. Pol. C. Sec. 894.

Cross-Reference

Appointing deputies for reward, penalty, sec. 94-3910.

References

State ex rel. Barney v. Hawkins, 79 M 506, 518, 257 P 411, 53 ALR 583.

Collateral References

Officers ≈ 13. 67 C.J.S. Officers § 30 et seq. 43 Am. Jur. 219, Public Officers, § 461.

59-413. (430) Oath, form of. Members of the legislative assembly and all officers, executive, ministerial, or judicial, must, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation, to wit: "I do solemnly swear (or affirm) that I will support, protect and defend the constitution of the United States and the constitution of the state of Montana, and that I will discharge the duties of my office with fidelity; and that I have not paid or contributed, or promised to pay or contribute either directly or indirectly, any money or other valuable thing to procure my nomination or election (or appointment), except for necessary and proper expenses expressely authorized by law; that I have not knowingly violated any election law of this state, or procured it to be done by others in my behalf; that I will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or nonperformance of any act or duty pertaining to my office other than the compensation allowed by law. So help me God." And no other oath, declaration, or test must be required as a qualification for any office or trust.

History: Ap. p. Sec. 3, p. 90, L. 1876; re-en. Sec. 575, 5th Div. Rev. Stat. 1879; re-en. Sec. 1067, 5th Div. Comp. Stat. 1887; amd. Sec. 1010, Pol. C. 1895; re-en. Sec. 362, Rev. C. 1907; re-en. Sec. 430, R. C. M. 1921. Cal. Pol. C. Sec. 904.

Cross-References

Bonds of county officers, sec. 6-201. Bonds of state officers, sec. 6-101. Constitutional provision as to oath, Const., Art. XIX, Sec. 1.

Officers

Before entering upon his duties an alderman must swear that he will not knowingly receive, direct or indirectly, any money or other valuable thing for the performance or nonperformance of any act or duty pertaining to his office other than the compensation allowed by law. State ex rel. Ryan v. Board of Aldermen, 45 M 188, 193, 122 P 569.

Operation and Effect

This section does not make the filing of an oath of office a condition precedent to the officer's entering upon the discharge of his duties of his office, but section 59-602 declares that, if he fails to file his official oath within the time prescribed, the office becomes vacant. State v. Uotila and Certain Intox. Liquors, 71 M 351, 354, 229 P 724.

References

State ex rel. McGrade v. District Court, 52 M 371, 375, 157 P 1157; State ex rel. Wallace v. Callow, 78 M 308, 319, 254 P 187; State ex rel. Barney v. Hawkins, 79 M 506, 518, 257 P 411, 53 ALR 583.

Collateral References

Officers 36(1); States 28.
67 C.J.S. Officers § 38; 81 C.J.S. States § 34, 76.
42 Am. Jur. 884, Public Officers, § 7.

59-414. (431) **Oath of the members of the legislature.** Members of the legislative assembly may take the oath of office at any time during the term for which they were elected.

History: En. Sec. 1011, Pol. C. 1895; re-en. Sec. 363, Rev. C. 1907; re-en. Sec. 431, R. C. M. 1921, Cal. Pol. C. Sec. 906.

Collateral References States©28(1). 81 C.J.S. States § 34.

59-415. (432) **Time of filing oath.** Whenever a different time is not prescribed by law, the oath of office must be taken, subscribed, and filed within thirty days after the officer has notice of his election or appointment, or before the expiration of fifteen days from the commencement of his term of office when no such notice has been given.

History: En. Sec. 1, Ch. 1, L. 1907; Sec. 364, Rev. C. 1907; re-en. Sec. 432, R. C. M. 1921. Cal. Pol. C. Sec. 907.

Constitutionality

Section 1, of Article XIX, of the Constitution, requiring every public officer to take the official oath therein prescribed is self-executing, mandatory, and conclusive upon the legislature; but it not being prohibited from requiring the filing of oath, it could, as it did by this section prescribe that such oath should be filed, without thereby rendering the section unconstitutional. State ex rel. Wallace v. Callow, 78 M 308, 318 et seq., 254 P 187.

Operation and Effect

This section does not make the filing of the oath of office a condition precedent to the officer's entering upon the discharge of his duties of his office; but section 59-602, declares that, if he fails to file his official oath within the time prescribed, the office becomes vacant. State v. Uotila and Certain Intox. Liquors, 71 M 351, 354, 229 P 724.

This section, providing that where a different time is not prescribed by law, a public officer shall within thirty days after he has notice of his election or appointment take, subscribe and file his oath, is directory and not mandatory; but the provisions of section 6-301, relative to the filing of the official bond within the time prescribed for filing the oath, is mandatory. State ex rel. Wallace v. Callow, 78 M 308, 254 P 187.

References

State ex rel. Nagle v. Stafford, 97 M 275, 289, 34 P 2d 372; Maddox v. Board of State Canvassers, 116 M 217, 224, 149 P 2d 112.

Collateral References

Officers \$36(1). 67 C.J.S. Officers § 38.

59-416. (433) **Oath, before whom taken.** Except when otherwise provided, the oath may be taken before any officer authorized to administer oaths.

History: En. Sec. 1013, Pol. C. 1895; re-en. Sec. 365, Rev. C. 1907; re-en. Sec. 433, R. C. M. 1921. Cal. Pol. C. Sec. 908.

Collateral References Officers©=36(1).

67 C.J.S. Officers § 38.

- **59-417.** (434) **Oath of office, where filed.** Every oath of office, certified by the officer before whom the same was taken, must be filed within the time required by law, except when otherwise specially provided, as follows:
- (1) The oath of all officers whose authority is not limited to any particular county, in the office of the secretary of state.
- (2) The oath of all officers, elected or appointed for any county, and of all officers whose duties are local, or whose residence in any particular county is prescribed by law, and of the clerks of the district courts, in the offices of the clerks of the respective counties.
- (3) Each judge of a district court must, as soon as he has taken and subscribed his official oath, file the same in the office of the secretary of state.

History: En. Sec. 1014, Pol. C. 1895; re-en. Sec. 366, Rev. C. 1907; re-en. Sec. 434, R. C. M. 1921; amd. Sec. 1, Ch. 77, L. 1949. Cal. Pol. C. Sec. 909.

Collateral References Officers © 36(1). 67 C.J.S. Officers § 38.

59-418. (435) **Oath of deputies and others.** Deputies, clerks, and subordinate officers must, within ten days after receiving notice of their appointment, take and file an oath in the manner required of their principals.

History: En. Sec. 1015, Pol. C. 1895; re-en. Sec. 367, Rev. C. 1907; re-en. Sec. 435, R. C. M. 1921. Cal. Pol. C. Sec. 910.

Collateral References
Officers@=36(1).
67 C.J.S. Officers § 38.
42 Am. Jur. 884, Public Officers, § 7.

CHAPTER 5

PROHIBITIONS AND GENERAL PROVISIONS APPLICABLE TO PUBLIC OFFICERS

Section 59-501. Certain officers not to be interested in contracts.

59-502. Nor in certain sales.

59-503. Contracts in violation, voidable.

59-504. Dealings in warrants, scrip, etc., prohibited.

59-505. Auditing officers, duties of.

59-506. Treasurer, duties of.

59-507. When settlements must be withheld.

59-508. Title contested, salary must not be paid.

59-509. Pendency of suit must be certified by the clerk.

59-510(1), 59-510(2). Office hours.

59-511. Signature of officer acting ex officio.

59-512. Records open to public inspection—exceptions.

59-513. Repealed.

59-514. Destruction of old county records may be ordered by commissioners with examiner's approval.

59-515. Destruction of old city or town records may be ordered by council with examiner's approval.

59-516. Certain records not to be destroyed.

59-517. Itemized accounts.

59-518. Nepotism defined.

59-519. Appointment of relative to office of trust or emolument unlawful.

59-520. Penalty for violation of nepotism law.

59-521 to 59-529. Repealed.

59-530. Possession of books and papers.

59-531. Proceedings to compel delivery of.

59-532. Attachment and warrant to enforce.

59-533. Executive and judicial officers may administer oaths.

59-534. Liability of officers for failure to make levy for sinking funds.

59-535. Liability for misuse of sinking fund.

59-536. Duty of county attorney to prosecute.

59-537. Definitions.

59-538. Expenses of persons in state service—per diem allowance.

59-539. Computation of per diem allowance.

59-540. Schedule of expenses-form.

59-541. Repealed.

59-542. Existing laws relating to counties and municipalities not changed.

59-501. (444) Certain officers not to be interested in contracts. Members of the legislative assembly, state, county, city, town, or township officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members.

History: En. Sec. 1020, Pol. C. 1895; re-en. Sec. 368, Rev. C. 1907; re-en. Sec. 444, R. C. M. 1921. Cal. Pol. C. Sec. 920.

Cross-References

Illegal interest in contracts, sec. 94-3907. Offenses by public officers, secs. 94-801

to 94-811, 94-2901 to 94-2919, 94-3901 to 94-3913.

Goods Bought and Consumed by City

Contracts for purchase of goods by a city from a corporation of which members of the city council were employees or officials not being void but voidable they cannot be avoided without restoring the consideration or otherwise doing equity. Grady v. City of Livingston, 115 M 47, 58, 141 P 2d 346.

Insufficiency of Complaint in Equity

Complaints in city taxpayers' equitable suits to recover from certain corporations, for the use of the city, amounts expended by the city for goods purchased and used for municipal purposes, which showed affirmatively that restoration could not be made and that there was no pecuniary injury to anyone and violation of a criminal statute by city officers under section 94-3907 and not by the corporations from which alone recovery was sought, did not state causes of action. Grady v. City of Livingston, 115 M 47, 58, 141 P 2d 346.

Suit to Recover Purchase Price of Goods Bought and Consumed

Equity makes no distinction between public bodies and private persons as to

their contractual obligations; the state and its subdivisions must observe the niceties in matter of such obligations, and where a city under voidable contracts of purchase of goods paid no more than value, and obtained and used them so that they could not be restored to the sellers, in an equitable action to recover the consideration paid, cannot retain the goods and their value too. Grady v. City of Livingston, 115 M 47, 61, 141 P 2d 346.

References

Hames v. Polson, 123 M 469, 215 P 2d 950.

Collateral References

Counties 22(2); Municipal Corporations 231; States 95.

20 C.J.S. Counties § 192; 67 C.J.S. Officers § 116; 81 C.J.S. States § 112.

43 Am. Jur. 105, Public Officers, §§ 297 et seq.

Relation as creditor of contracting party as constituting interest within statute against public officer being interested in public contract. 73 ALR 1352.

Relationship as disqualifying interest within statute making it unlawful for an officer to be interested in a public contract. 74 ALR 792.

59-502. (445) Nor in certain sales. State, county, town, township, and city officers must not be purchasers at any sale, nor vendors at any purchase made by them, in their official capacity.

History: En. Sec. 1021, Pol. C. 1895; re-en. Sec. 369, Rev. C. 1907; re-en. Sec. 445, R. C. M. 1921. Cal. Pol. C. Sec. 921.

References

Grady v. City of Livingston, 115 M 47, 54, 141 P 2d 346.

Collateral References

Counties 122(2); Municipal Corporations 231; States 95.

63 C.J.S. Municipal Corporations § 988; 67 C.J.S. Officers § 116; 81 C.J.S. States § 112.

59-503. (446) Contracts in violation, voidable. Every contract made in violation of any of the provisions of the two preceding sections may be avoided at the instance of any party except the officer interested therein.

History: En. Sec. 1022, Pol. C. 1895; re-en. Sec. 370, Rev. C. 1907; re-en. Sec. 446, R. C. M. 1921. Cal. Pol. C. Sec. 922.

Avoidance of Contracts

Contracts made in violation of this section may be avoided at the instance of parties other than by the officer unlawfully entering into them; they are not absolutely void but only voidable by the former, this being particularly so where section 94-3907 prescribes a penalty for violation of the section. Grady v. City of Livingston, 115 M 47, 55, 141 P 2d 346.

Voidable contracts are not legally void and cannot be set aside or disregarded until they are decreed to be void by a court. Grady v. City of Livingston, 115 M 47, 56, 141 P 2d 346.

Construction

This section is so plain that it interprets and construes itself, and it is not allowable to go elsewhere in search of conjecture in order to restrict or extend its meaning. Grady v. City of Livingston, 115 M 47, 55, 141 P 2d 346.

Purpose

The purpose of this section, as applied to a city, certain officers of which, purchased goods for its use while in the employ of corporations from which they were purchased, is to leave the city, made a

party to such contracts, free to accept or reject them at its option. The intent of sections 59-501 to 59-503 is to purge the public service of persons who betray their public trust, not to penalize the selling corporation because its agent while serving the city violated his trust, nor to confiscate property of business concerns whose employees happen to be serving the

municipality. Grady v. City of Livingston, 115 M 47, 57, 58, 141 P 2d 346.

Collateral References

Counties 122(2); Municipal Corporations 231; States 95.

20 C.J.S. Counties § 192; 63 C.J.S. Municipal Corporations § 988; 81 C.J.S. States § 112.

59-504. (447) Dealings in warrants, scrip, etc., prohibited. The state officers, the several county, city, town, and township officers of this state, their deputies and clerks, are prohibited from purchasing or selling, or in any manner receiving to their own use or benefit, or to the use or benefit of any person or persons whatever, any state, county, or city warrants, scrip, orders, demands, claims, or other evidences of indebtedness against the state, or any county, city, town, or township thereof, except evidences of indebtedness issued to or held by them for services rendered as such officer, deputy, clerk, and evidences of the funded indebtedness of such state, county, city, township, town, or corporation.

History: En. Sec. 1023, Pol. C. 1895; re-en. Sec. 371, Rev. C. 1907; re-en. Sec. 447, R. C. M. 1921. Cal. Pol. C. Sec. 923.

Defective Information Charging Violation

An information, which charges defendant with being accessory to a county official in purchasing evidence of indebtedness against a county, contrary to the provisions of this section and 94-3907, post, which fails to state that defendant knew that the person whose accessory he was charged with being, was a county officer, was defective. State v. Danzer, 35 M 269, 272, 88 P 952.

Officers

A police captain is an "officer" within

the meaning of this section and section 94-3907, making the purchase of a city warrant by city officers a crime punishable by disqualification from holding office, and the fact that the accused bought the warrant for a brother officer is unavailing as a defense. State ex rel. O'Brien v. City of Butte, 54 M 533, 537, 172 P 134.

References

State ex rel. Anderson v. Fousek, 91 M 448, 453, 8 P 2d 791, 84 ALR 303.

Collateral References

Officers ≈ 121. 67 C.J.S. Officers § 116.

59-505. (448) Auditing officers, duties of. Every officer whose duty it is to audit and allow the accounts of other state, county, city, township, or town officers, must, before allowing such accounts, require each of such officers to make and file with him an affidavit that he has not violated any of the provisions of this chapter.

History: En. Sec. 1024, Pol. C. 1895; re-en. Sec. 372, Rev. C. 1907; re-en. Sec. 448, R. C. M. 1921. Cal. Pol. C. Sec. 924.

Collateral References

Counties 94; Muncipal Corporations

© 172; States 76; Towns 32. 20 C.J.S. Counties §§ 149, 151; 62 C.J.S. Municipal Corporations § 546 et seq.; 81 C.J.S. States § 159; 87 C.J.S. Towns § 79 et seq.

59-506. (449) Treasurer, duties of. Officers charged with the disbursement of public moneys must not pay any warrant or other evidence of indebtedness against the state, county, city, town, or township, when the same has been purchased, sold, received, or transferred contrary to any of the provisions of this chapter.

History: En. Sec. 1025, Pol. C. 1895; re-en. Sec. 373, Rev. C. 1907; re-en. Sec. 449, R. C. M. 1921, Cal. Pol. C. Sec. 925.

Collateral References

Counties 168; Municipal Corporations

€ 904; States 142; Towns 50. 20 C.J.S. Counties § 252; 64 C.J.S. Municipal Corporations § 1900 et seq.; 81 C.J.S. States § 175; 87 C.J.S. Towns § 119 et seq.

59-507. (450) When settlements must be withheld. Every officer charged with the disbursement of public moneys, who is informed by affidavit establishing probable cause that any officer whose account is about to be settled, audited, or paid by him, has violated any of the provisions of this chapter, must suspend such settlement or payment, and cause such officer to be prosecuted for such violation by the county attorney of the county. In case there be judgment for the defendant upon such prosecution, the proper officer may proceed to settle, audit, or pay such account as if no such affidavit had been filed.

History: En. Sec. 1026, Pol. C. 1895; re-en. Sec. 374, Rev. C. 1907; re-en. Sec. 450, R. C. M. 1921. Cal. Pol. C. Sec. 926.

Collateral References

Counties 158; Municipal Corporations 883; States 123; Towns 48.

20 C.J.S. Counties § 234; 64 C.J.S. Municipal Corporations § 1883; 81 C.J.S. States § 156 et seq.; 87 C.J.S. Towns § 80 et seq. 43 Am. Jur. 142, Public Officers, §§ 320 et seq.

59-508. (451) Title contested, salary must not be paid. When the title of the incumbent of any office in this state is contested by proceedings instituted in any court for that purpose, no warrant can thereafter be drawn or paid for any part of his salary until such proceedings have been finally determined.

History: En. Sec. 1040, Pol. C. 1895; re-en. Sec. 375, Rev. C. 1907; re-en. Sec. 451, R. C. M. 1921. Cal. Pol. C. Sec. 936.

Exclusion from Office

Under this section, it was no defense to an action by a police officer for his salary during the time he was wrongfully deprived of his office, that it had been paid to a de facto officer, after the commencement of quo warranto proceedings by the plaintiff. Wynne v. City of Butte, 45 M 417, 422, 123 P 531.

If a police officer is wrongfully excluded from his office, his earnings in other employments during the time of his exclusion cannot be charged against his claim for salary. Wynne v. City of Butte, 45 M 417, 422, 123 P 531.

Right to Receive Salary

This section recognizes the principle that he who has the title to an office may receive the salary incident to it, whether he serves or not. Peterson v. City of Butte, 44 M 401, 410, 120 P 483.

References

Wilkinson v. La Combe, 59 M 518, 526, 197 P 836.

Collateral References

Officers 594. 67 C.J.S. Officers, § 83 et seq.

59-509. (452) Pendency of suit must be certified by the clerk. As soon as such proceedings are instituted, the clerk of the court in which they are pending must certify the facts to the officers whose duty it would otherwise be to draw such warrant or pay such salary.

History: En. Sec. 1041, Pol. C. 1895; re-en. Sec. 376, Rev. C. 1907; re-en. Sec. 452, R. C. M. 1921. Cal. Pol. C. Sec. 937.

Operation and Effect

The failure of the clerk of the court to comply with the above section, by certify-

ing to the disbursing officer the fact that the title to an office was contested, did not prevent a police officer from recovering his salary for the time during which he was wrongfully ousted and the salary paid to a de facto officer. Wynne v. City of Butte, 45 M 417, 422, 123 P 531.

Collateral References

Clerks of Courts 67; Officers 94; States 57.

14 C.J.S. Clerks of Courts § 38; 67 C.J.S. Officers § 83 et seq.; 81 C.J.S. States § 89 et seq.

59-510(1). (453) Office hours. Unless otherwise provided by law every officer must keep his office open for the transaction of business continuously from eight o'clock A. M., until five o'clock P. M. each day, except upon Saturdays and holidays. All salaried state employees shall work a minimum of forty (40) hours a week. Every officer shall keep his office open at such other times as the accommodation of the public or the proper transaction of business requires, excepting the state treasurer, who in his discretion may in the interest of the safekeeping of funds, securities and records under his control, close his office during the period from twelve o'clock noon to one o'clock P. M. every day.

History: En. Sec. 1134, Pol. C. 1895; re-en. Sec. 436, Rev. C. 1907; re-en. Sec. 453, R. C. M. 1921; amd. Sec. 1, Ch. 5, L. 1931; amd. Sec. 1, Ch. 22, L. 1951; amd. Sec. 1, Ch. 253, L. 1957; amd. Sec. 1, Ch. 2, L. 1961. Cal. Pol. C. Sec. 1030.

Compiler's Note

Section 59-510 was amended twice in 1961, once by section 1 of Ch. 2, Laws 1961, approved January 27, 1961, and once by section 1, Ch. 33, Laws 1961, approved February 23, 1961. Neither chapter menioned nor contained the changes made by the other chapter, nor did either chapter contain an effective date clause, but each inserted a different second sentence in the section. The amendments do not appear to conflict and both would be effective if they are not in conflict. The section as set out above is the text set out in Ch. 2,

Laws 1961. The section as amended by Ch. 33, Laws 1961, is set out as section 59-510(2).

Secretary of State

Under the above section (prior to 1961 amendment) fixing the office hours of the secretary of state as from 9 o'clock in the morning until 5 o'clock in the afternoon of every business day, "and at other times when the accommodation of the public or the proper transaction of business requires," he may transact business in his office at any time during the twenty-four hours of each business day. State ex rel. Bevan v. Mountjoy, 82 M 594, 600, 268 P 558.

References

Fey v. A A Oil Corp., 126 M 552, 255 P 2d 339, 341.

59-510(2). (453) Office hours. Unless otherwise provided by law every officer must keep his office open for the transaction of business continuously from eight o'clock A. M. until five o'clock P. M. each day except Saturdays and legal holidays. All full-time salaried county and city employees shall work a minimum of forty (40) hours per week. Every officer shall keep his office open at such other times as the accommodation of the public or the proper transaction of business requires, excepting the state treasurer and county and city treasurers, who, in their discretion, may, in the interest of the safekeeping of funds, securities and records under their control, close their offices during the period from twelve o'clock noon to one o'clock P. M. every day.

History: En. Sec. 1134, Pol. C. 1895; reen. Sec. 436, Rev. C. 1907; re-en. Sec. 453, R. C. M. 1921; amd. Sec. 1, Ch. 5, L. 1931; amd. Sec. 1, Ch. 22, L. 1951; amd. Sec. 1, Ch. 253, L. 1957; amd. Sec. 1, Ch. 33, L. 1961. Cal. Pol. C. Sec. 1030.

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Collateral References

Officers \$\sim 107; States \$\sim 68. 67 C.J.S. Officers § 103 et seq.; 81 C.J.S. States §§ 58 et seq., 65 et seq.

59-511. (454) Signature of officer acting ex officio. When an officer discharges ex officio the duties of another office than that to which he is elected or appointed, his official signature and attestation, except as otherwise provided by law, must be in the name of the office the duties of which he discharges.

History: En. Sec. 1135, Pol. C. 1895; re-en. Sec. 437, Rev. C. 1907; re-en. Sec. 454, R. C. M. 1921, Cal. Pol. C. Sec. 1031.

Collateral References
Officers 110.

Officers 110. 67 C.J.S. Officers § 114.

59-512. (455) Records open to public inspection — exceptions. The public records and other matters in the office of any officer are at all times, during office hours, open to the inspection of any person. In cases of attachment, the clerk of the court with whom the complaint is filed must not make public the fact of the filing of the complaint, or the issuing of such attachment, until after the filing of return of service of attachment.

No files in the office of the clerk of district court relating to the adoption of children shall be open to examination or inspection by any person unless the person desiring to examine or inspect any such file shall first obtain written permission from the district judge, and no district judge shall grant any applicant permission to examine or inspect any such file in the office of clerk of district court unless such applicant shall set forth in his application good and sufficient cause for such examination or inspection.

History: En. Sec. 1136, Pol. C. 1895; re-en. Sec. 438, Rev. C. 1907; re-en. Sec. 455, R. C. M. 1921; amd. Sec. 1, Ch. 112, L. 1945. Cal. Pol. C. Sec. 1032.

Referendum Petitions

Whether or not referendum petitions delivered to a clerk and recorder for certification to the secretary of state are "public records" and so open to inspection, they are at least "other matters in the office of

any officer" within the meaning of this section, and clerk and recorder will be compelled by mandamus to permit inspection of them. State ex rel. Halloran v. McGrath, 104 M 490, 498, 67 P 2d 838.

Collateral References

Records № 14.
76 C.J.S. Records § 35 et seq.
45 Am. Jur. 426, Records and Recording Laws, §§ 14-27.

59-513. (455.1) Repealed—Chapter 189, Laws of 1953.

Repeal

This section (Sec. 1, Ch. 92, L. 1935), relating to the destruction of old state records by the board of examiners, was

repealed by Sec. 11, Ch. 189, Laws 1953. For present law, see secs. 82-3201 to 82-3206.

59-514. (455.2) Destruction of old county records may be ordered by commissioners with examiner's approval. Any county officer may destroy old worthless reports, papers or records in his office that have served their purpose and that are substantiated by permanent records, upon the order of the board of county commissioners and with the approval of the state examiner.

History: En. Sec. 2, Ch. 92, L. 1935.

59-515. (455.3) Destruction of old city or town records may be ordered by council with examiner's approval. Any city or town officer may destroy

old worthless reports, papers or records in his office that have served their purpose and that are substantiated by permanent records, upon the order of the city or town council or commission and with the approval of the state examiner.

History: En. Sec. 3, Ch. 92, L. 1935.

59-516. (455.4) Certain records not to be destroyed. Under no circumstances shall any claim, warrant, voucher, bond or treasurer's general receipt be destroyed by any county, city or town officer.

History: En. Sec. 4, Ch. 92, L. 1935; amd. Sec. 12, Ch. 189, L. 1953.

Collateral References
Records \$\infty 13.
76 C.J.S. Records \\$ 34.

59-517. (456) Itemized accounts. All state officers and appointees must produce itemized accounts for all moneys, other than salaries, expended by them, accompanied by affidavit that the money has been expended.

History: En. Sec. 1137, Pol. C. 1895; re-en. Sec. 439, Rev. C. 1907; re-en. Sec. 456, R. C. M. 1921. Cal. Pol. C. Sec. 424.

Collateral References

. States 76.
81 C.J.S. States § 159.
43 Am. Jur. 122, Public Officers, §§ 320 et seq.

59-518. (456.1) **Nepotism defined.** Nepotism is the bestowal of political patronage by reason of relationship rather than of merit.

History: En. Sec. 1, Ch. 12, L. 1933.

Strict Construction Not Required

Contention that this statute, defining "nepotism" and prohibiting public officers, boards or commissions from appointing relatives to a position of trust or emolument, and providing punishment by fine and imprisonment in the county jail, should be strictly construed as a penal

statute, may not be sustained, section 94-101 providing that the common-law rule that penal statutes shall be strictly construed, has no application to the Penal Code. State ex rel. Kurth v. Grinde, 96 M 608, 613, 32 P 2d 15.

Collateral References

Officers©=29. 67 C.J.S. Officers § 22.

59-519. (456.2) Appointment of relative to office of trust or emolument unlawful. It shall be unlawful for any person or any member of any board, bureau or commission, or employee at the head of any department of this state or any political subdivision thereof to appoint to any position of trust or emolument any person or persons related to him or them or connected with him or them by consanguinity within the fourth degree, or by affinity within the second degree; except that the provisions of this section shall not apply to sheriffs in the appointment of females as cooks and/or matrons. It shall further be unlawful for any person or any member of any board, bureau or commission, or employee of any department of this state, or any political subdivision thereof to enter into any agreement or any promise with other persons or any members of any boards, bureaus or commissions, or employees of any department of this state or any of its political subdivisions thereof to appoint to any position of trust or emolument any person or persons related to them or connected with them by consanguinity within the fourth degree, or by affinity within the second

History: En. Sec. 2, Ch. 12, L. 1933; amd. Sec. 1, Ch. 94, L. 1955.

Confirmation of Appointment of Son

This section does not preclude a city alderman from voting in confirmation of

the appointment of his son by the mayor to a subordinate city office, the statute making no provision for such a contingency. State ex rel. Kurth v. Grinde, 96 M 608, 613, 32 P 2d 15.

Illegal Employment of Teacher

Where the father, mother and uncle of the only pupils attending school were the sole persons eligible to serve as trustees, the employment of the mother who, though elected as trustee preferred to act as teacher and did not qualify as trustee, was illegal under this section. State ex rel. Hoagland v. School Dist. No. 13 of Prairie County, 116 M 294, 298, 151 P 2d

Where the employment by a board of school trustees of a teacher related to a member thereof by consanguinity or affinity was in violation of this section, it was illegal and the teacher could not be deemed re-elected under section 75-2401 in the absence of notice to her after three years of service that her services would be no longer required, that section presupposing capacity to hold the position both legally and in fact. State ex rel. Hoagland v. School Dist. No. 13 of Prairie County, 116 M 294, 298, 151 P 2d 168.

(456.3) Penalty for violation of nepotism law. Any public officer or employee, or any member of any board, bureau or commission of this state or any political subdivision thereof who shall, by virtue of his office, have the right to make or appoint any person to render services to this state or any subdivision thereof, and who shall make or appoint to such services or enter into any agreement or promise with any other person or employee, or any member of any board, bureau or commission of any other department of this state or any of its subdivisions to appoint to any position any person or persons related to him or them, or connected with him or them by consanguinity within the fourth degree, or by affinity within the second degree, shall thereby be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not less than fifty dollars nor more than one thousand dollars, or by imprisonment in the county jail for not less than six months, or by both such fine and imprisonment.

History: En. Sec. 3, Ch. 12, L. 1933.

References

State ex rel. Kurth v. Grinde, 96 M 608, 613, 32 P 2d 15.

59-521 to 59-523. (457 to 459) Repealed—Chapter 66, Laws of 1955.

These sections (Secs. 1 to 3, p. 102, L. 1897), relating to traveling expenses of state officers, were repealed by Sec. 7, Ch. 66, Laws 1955. For present provisions, see secs. 59-537 to 59-540, 59-542.

These sections (Secs. 1 to 6, Ch. 108, L. 1925; Sec. 1, Ch. 40, L. 1933; Sec. 1, Ch. 32, Ex. L. 1933; Sec. 1, Ch. 92, L. 1941; Sec. 1, Ch. 139, L. 1943; Sec. 1, Ch. 17, L.

59-524 to 59-529. (459.1 to 459.6) Repealed—Chapter 66, Laws of 1955.

1949; Sec. 1, Ch. 7, L. 1951; Sec. 1, Ch. 64, L. 1953), relating to expenses of persons in state service, were repealed by Sec. 7, Ch. 66, Laws 1955. For present provisions, see secs. 59-537 to 59-540, 59-542.

(460) Possession of books and papers. Every public officer is entitled to the possession of all books and papers pertaining to his office, or in the custody of a former incumbent by virtue of his office.

History: En. Sec. 1120, Pol. C. 1895; re-en. Sec. 427, Rev. C. 1907; re-en. Sec. 460, R. C. M. 1921. Cal. Pol. C. Sec. 1014. Collateral References

Officers € 110. 67 C.J.S. Officers § 110 et seq. 43 Am. Jur. 123, Public Officers, § 323.

(461) Proceedings to compel delivery of. If any person, whether a former incumbent or another person, refuse or neglect to deliver to the actual incumbent any such books or papers, such actual incumbent may apply, by complaint, to any district court, or judge of the county where the person so refusing or neglecting resides, and the court or judge must proceed in a summary way, after notice to the adverse party, to hear the allegations and proofs of the parties, and to order any such books and papers to be delivered to the petitioners.

History: En. Sec. 1121, Pol. C. 1895; re-en. Sec. 428, Rev. C. 1907; re-en. Sec. 461, R. C. M. 1921. Cal. Pol. C. Sec. 1015. Collateral References Records \$23. 76 C.J.S. Records \$34.

Cross-Reference

Wrongful holding over after successor elected, sec. 94-3911.

59-532. (462) Attachment and warrant to enforce. The execution of the order and delivery of the books and papers may be enforced by attachment as for a witness, and also, at the request of the plaintiff, by a warrant directed to the sheriff or a constable of the county, commanding him to search for such books and papers, and to take and deliver them to the plaintiff.

History: En. Sec. 1122, Pol. C. 1895; re-en. Sec. 429, Rev. C. 1907; re-en. Sec. 462, R. C. M. 1921. Cal. Pol. C. Sec. 1016.

59-533. (463) Executive and judicial officers may administer oaths. Every executive, state and judicial officer may administer and certify oaths.

History: En. Sec. 1132, Pol. C. 1895; re-en. Sec. 434, Rev. C. 1907; re-en. Sec. 463, R. C. M. 1921. Cal. Pol. C. Sec. 1028.

Collateral References
Oath 5 2.
67 C.J.S. Oaths and Affirmations § 5.

(463.1) Liability of officers for failure to make levy for sinking funds. That when any officer or officers or board or body of officers of any county, city, school district, irrigation district or other municipal or public corporation of the state are or shall be required by law to provide by a levy of taxes, or by certifying the amount of money required, or otherwise, a sinking fund or fund required to pay at maturity any bonds hereafter issued or created, such officer or officers and the members of such board or body of officers shall be jointly and severally liable to the county, city, school districts, irrigation district, or other municipal or public corporation which they represent if they shall fail to perform any such duties so required by law, as in this section hereby specified, in an amount equal to the sum which would have been added to such fund had they performed such duty. Provided: that when any such board shall fail or neglect to perform any such duty, no minority member of said board who shall have moved said board or voted in favor of a performance of such duty shall be held liable.

History: En. Sec. 1, Ch. 5, L. 1923.

Collateral References

Counties 88; Municipal Corporations 170; Officers 114; Schools and School Districts 63(3); Waters and Water Courses 230.

20 C.J.S. Counties § 139; 62 C.J.S. Municipal Corporations § 545; 67 C.J.S. Officers § 125 et seq.; 78 C.J.S. Schools and School Districts § 120 et seq.; 94 C.J.S. Waters § 243(6).

59-535. (463.2) Liability for misuse of sinking fund. Any person or persons who shall take, use, appropriate or permit to be taken, used or

appropriated any portion of any such fund as herein specified for any purpose other than that permitted by law shall be jointly and severally liable to the county, city, school district, irrigation district, or other municipal or public corporation to which said fund shall belong for the portion of such fund so unlawfully taken, used or appropriated.

History: En. Sec. 2, Ch. 5, L. 1923.

Collateral References

20 C.J.S. Counties § 277; 64 C.J.S. Municipal Corporations § 1953 et seq.; 67 C.J.S. Officers §118.

Counties 186½; Municipal Corporations 951; Officers 111.

59-536. (463.3) Duty of county attorney to prosecute. It shall be the duty of the county attorney in each county to commence and prosecute all actions to enforce any liability hereby created. Such actions shall be tried as civil actions at law.

History: En. Sec. 3, Ch. 5, L. 1923.

20 C.J.S. Counties § 277; 27 C.J.S. District and Prosecuting Attorneys § 15.

Collateral References

Counties 186½; District and Prosecuting Attorneys 9.

59-537. Definitions. When used in this act:

- (a) The term "subsistence" means lodging, meals and other necessary expenses incidental to the personal sustenance or comfort of the traveler, including fees or tips to porters and stewards.
- (b) The term "per diem allowance" means a daily flat rate of payment in lieu of actual expenses.

History: En. Sec. 1, Ch. 66, L. 1955.

Expenses of persons in state service—per diem allowance. Every person engaged in any service in every department of state, inclusive of persons in appointive positions, or positions created by law, whose duties consist of full or partial time in traveling to perform any service for the state under monthly or yearly salary, or who may be sent by any authorized executive of any department of the state upon a mission in performance of any clerical work, supervisory or extension work or otherwise, of every kind and character, shall be allowed, for the time engaged in such travel, eight dollars (\$8.00) per day for such travel within the state of Montana and eleven dollars (\$11.00) per day for such travel outside the state of Montana; provided, that the provisions of this act shall not apply to persons holding offices specifically provided for in section 93-305, or section 93-313; provided that nothing herein contained shall be construed as affecting the validity of section 43-310; and provided further that the provisions of this act shall not apply to the elective state public officers of the state of Montana who shall in lieu thereof be authorized actual and necessary expenses while engaged in state service away from Helena, not to exceed fifteen dollars (\$15.00) per day.

History: En. Sec. 2, Ch. 66, L. 1955; amd. Sec. 1, Ch. 207, L. 1957; amd. Sec. 1, Ch. 108, L. 1961.

59-539. Computation of per diem allowance. In computing the per diem in lieu of subsistence for continuous travel of more than twentyfour (24) hours, the calendar day, midnight to midnight, shall be the unit, and for fractional parts of a day at the commencement or ending of such continuous travel, constituting a travel period, one-fourth (1/4) of the rate for a calendar day shall be allowed for each period of six (6) hours or fraction thereof. When a change in the per diem rate is made during a day, the rate of per diem in effect at the beginning of the quarter in which the change occurs shall continue to the end of such quarter. For continuous travel of twenty-four (24) hours or less, constituting a travel period, such period shall be regarded as commencing with the beginning of the travel and ending with the completion thereof, and for each six (6) hour portion of the period or fraction thereof onefourth (1/4) of the rate for a calendar day shall be allowed; provided, however, that no per diem, excepting an allowance not to exceed one dollar and twenty-five cents (\$1.25) per day for moneys actually expended for mid-day meals, shall be allowed when the departure is at or after 8:00 A. M. and the return on the same day is at or prior to 6:00 P. M. In no case shall any per diem or allowance whatsoever be paid for any absence not exceeding three (3) hours.

History: En. Sec. 3, Ch. 66, L. 1955.

59-540. Schedule of expenses—form. Every such person so engaged shall periodically submit a claim containing a schedule of expenses and amounts claimed for said period. Said schedule shall show in what capacity such person was engaged each day while away from the department in which said daily duties arose, and shall show expense items of each day in detail, such as the amount of per diem allowance claimed, transportation fare, mileage and other such items.

History: En. Sec. 4, Ch. 66, L. 1955; amd. Sec. 26, Ch. 97, L. 1961.

59-541. Repealed—Chapter 97, Laws of 1961.

Repeal the board of examiners, was repealed by This section (Sec. 5, Ch. 66, L. 1955), relating to schedule of expenses filed by

59-542. Existing laws relating to counties and municipalities not changed. This act shall not be construed to change in any manner the existing laws of the state pertaining to the conduct of any county, city or municipal office.

History: En. Sec. 6, Ch. 66, L. 1955.

CHAPTER 6

RESIGNATIONS AND VACANCIES

Section 59-601. Resignations, how made.

59-602. Vacancies, how they occur.

59-603. Notice of removal, by and to whom given. 59-604. Vacancies in legislative assembly, how filled.

Vacancies, how filled when not otherwise provided for. 59-605.

Vacancies occurring during recess of the legislative assembly.

Vacancies in certain state offices, how filled. 59-607.

59-608. Powers and duties of officer filling unexpired term.

59-601. (510) **Resignations, how made.** Resignations must be in writing and made as follows:

- 1. By the governor and lieutenant governor, to the legislative assembly, if it is in session; and if not, then to the secretary of state.
 - By all officers commissioned by the governor, to the governor.
- By senators and members of the house of representatives, if the legislative assembly is not in session, to the governor; if it is in session, to the presiding officer of the branch to which the member belongs, who must immediately transmit the same to the governor.
- By all county and township officers not commissioned by the governor, to the clerk of the board of commissioners of their respective counties.
- 5. By all other appointed officers, to the body or officer that appointed them.
- 6. In all cases not otherwise provided for, by filing the resignation in the office of the secretary of state.

History: Ap. p. Sec. 41, p. 468, Cod. Stat. 1871; re-en. Sec. 553, 5th Div. Rev. Stat. 1879; re-en. Sec. 1045, 5th Div. Comp. Stat. 1887; amd. Sec. 1100, Pol. C. 1895; re-en. Sec. 419, Rev. C. 1907; amd. Sec. 1, Ch. 8, L. 1921; re-en. Sec. 510, R. C. M. 1921. Cal. Pol. C. Sec. 995.

State Land Agent

Where the state land agent sent his resignation in writing to the governor, and the latter accepted it, there was a vacancy in the office, though the board did not consent to the acceptance. State ex rel. Neill v. Page, 20 M 238, 244, 50 P 719.

Collateral References

Counties 66; Officers 62; State

20 C.J.S. Counties § 108; 67 C.J.S. Officers § 55 et seq.; 81 C.J.S. States § 78.
43 Am. Jur. 22, Public Officers, §§ 165

et seq.

- 59-602. (511) Vacancies, how they occur. An office becomes vacant on the happening of either of the following events before the expiration of the term of the incumbent:
 - The death of the incumbent.
- His insanity, found upon a commission of lunacy issued to determine the fact.
 - 3. His resignation.
 - 4. His removal from office.
- 5. His ceasing to be a resident of the state, or, if the office be local, of the district, city, county, town, or township, for which he was chosen or appointed, or within which the duties of his office are required to be discharged.
- 6. His absence from the state, without the permission of the legislative assembly, beyond the period allowed by law.
- 7. His ceasing to discharge the duty of his office for the period of three consecutive months, except when prevented by sickness, or when absent from the state by permission of the legislative assembly.

- 8. His conviction of a felony, or of any offense involving moral turpitude, or a violation of his official duties.
- 9. His refusal or neglect to file his official oath or bond within the time prescribed.
- 10. The decision of a competent tribunal declaring void his election or appointment.

History: Ap. p. Sec. 42, p. 385, Bannack Stat.; re-en. Sec. 42, p. 468, Cod. Stat. 1871; amd. Sec. 554, 5th Div. Rev. Stat. 1879; re-en. Sec. 1046, 5th Div. Comp. Stat. 1887; amd. Sec. 1101, Pol. C. 1895; re-en. Sec. 420, Rev. C. 1907; re-en. Sec. 511, R. C. M. 1921. Cal. Pol. C. Sec. 996.

Cross-References

Impeachment, secs. 94-5401 to 94-5419. Removal of officers, secs. 94-5501 to 94-5516.

Conviction of a Felony

This section declaring that an office becomes vacant upon conviction of the incumbent of a felony, applies not only to one convicted under the state laws but as well to one convicted under federal laws. State ex rel. Anderson v. Fousek, 91 M 448, 451 et seq., 8 P 2d 791, 84 ALR 303.

In determining whether, under this section, the office of a city policeman automatically becomes vacant upon his conviction of the crime of conspiracy (a felony) under the federal law, the supreme court may not take into consideration the circumstances mitigating the offense, nor the fact that if the defendant had appealed, the judgment might have been set aside. State ex rel. Anderson v. Fousek, 91 M 448, 451 et seq., 8 P 2d 791, 84 ALR 303.

Filing of Bond

Where a county commissioner-elect, after refusal of the district judge to approve his bond, filed a new one but did not present it to the judge for approval, there was no legal filing of it at any time and the action of the judge in declaring a vacancy under subd. 9 of this section was correct. State ex rel. Wallace v. Callow, 78 M 308, 326 et seq., 254 P 187.

Any office becomes vacant under this section, when the person elected or appointed to it neglects, inter alia, to file his official bond within the time prescribed, and the vacancy may be filled at once; but where the officer at fault occupies a state office requiring confirmation by the senate, the appointment of a successor is not effective to oust the incumbent until the new appointee is confirmed. State ex rel. Nagle v. Stafford, 99 M 88, 93, 43 P 2d 636.

Future Vacancies

This section declaring when an office becomes vacant, applies not only to persons, things, and conditions in being at the time of its passage but also to such as come into existence thereafter and which fall within its terms. State ex rel. Anderson v. Fousek, 91 M 448, 451 et seq., 8 P 2d 791, 84 ALR 303.

Implied Amendment

The legislature had the power to amend subsection 6 of this section and section 59-305, as it did by enacting Ch. 47, Laws 1941 (77-701 et seq.), providing for officers' leave of absence, or for their temporary suspension or relief from duty during military service, except in so far as the result would be violative of some provision of the Constitution such as Art. VIII, sec. 37 thereof, relating to judicial officers absenting themselves from the state for more than sixty consecutive days. Gullickson v. Mitchell, 113 M 359, 368, 126 P 2d 1106.

Office of Lieutenant Governor Is Not Vacant When the Officer Is Discharging Functions of Governor

Upon the resignation of the governor and assumption of the duties and powers of the office by the lieutenant governor, no vacancy in the office of lieutenant governor is created, he merely discharging the functions of governor under the mandate of the constitution, and that by reason of being lieutenant governor. State ex rel. Lamey v. Mitchell, 97 M 252, 260, 34 P 2d 369.

Police Officers

A member of the city police force is the incumbent of an office within the meaning of this section. State ex rel. Anderson v. Fousek, 91 M 448, 451 et seq., 8 P 2d 791, 84 ALR 303.

Provisions, When Exclusive

In a proceeding in quo warranto, where the commissioner of agriculture, labor and industry was holding over until his successor should be appointed and qualified, and the appointment of his successor was not made until after adjournment of the legislature, preventing confirmation by the senate, there was no "vacancy" in the office as defined by this section, the provisions of which are exclusive and do not

cover a contingency such as the one presented in the instant case, to be filled by appointment, and judgment of the district court that the claim of the appointee was without foundation was correct. State ex rel. Nagle v. Stafford, 97 M 275, 291, 34 P 2d 372.

This statute does not provide the exclusive method by which an office of district judge can become vacant. State ex rel. Jardine v. Ford, 120 M 507, 188 P 2d 422, 425.

Resignation

Where the state land agent tendered his resignation to the governor, to be effective at the discretion of the governor, and the governor in writing accepted the resignation, to take effect on a certain date, the incumbent, on that date ceased to be state land agent without any action by the state board of land commissioners. State ex rel. Neill v. Page, 20 M 238, 245, 50 P 719.

By a resignation before the expiration of a term, as provided in this section, is meant a resignation before the end of a fixed time, or before the expiration of the time during which an official has a right to serve. State ex rel. Neill v. Page, 20 M 238, 245, 50 P 2d 372.

Retirement

Retirement of a district judge under the provisions of sections 68-101 et seq. creates a vacancy which must be filled by the governor. State ex rel. Jardine v. Ford, 120 M 507, 188 P 2d 422, 425.

Tie Vote

An office becomes vacant on the happening of certain events enumerated in this section, which enumeration is exclusive. The contingency of a tie vote not being provided for, when the two candidates for the office of county superintendent of schools received an equal number of votes, there was no vacancy, and the previous incumbent was entitled to hold the office, until a successor was regularly elected. State ex rel. Chenoweth v. Acton, 31 M 37, 39, 77 P 299. See, however, State ex rel. Jones v. Foster, 39 M 583, 587, 590, 591, 592, 104 P 860; State ex rel. Klick v. Wittmer, 50 M 22, 26, 144 P 648.

Vacancies Not Enumerated

Though it may be granted that a vacancy is not created by any circumstance not mentioned in this section it does not follow that a resignation, which is mentioned therein as a cause of vacancy, may not impliedly arise upon the acceptance of an incompatible office. On the contrary, the authorities are practically unanimous that, as to an office which the incumbent may vacate by his own act, a

resignation does occur upon his acceptance of another office incompatible therewith. The office of city purchasing agent being incompatible with that of alderman of a city, the acceptance of the former by such officer was equivalent to his resignation as alderman, and a vacancy was thereby created which the city council was authorized to fill by a majority vote of the members then composing the council. State ex rel. Klick v. Wittmer, 50 M 22, 26, 144 P 648.

Upon the creation of an additional judgeship in a judicial district, a vacancy existed until filled by appointment by the governor, this section, enumerating the instances when vacancies occur, not being exclusive. State ex rel. Patterson v. Lentz, 50 M 322, 336, 146 P 932.

References

In re Craigie's Estate, 24 M 37, 42, 60 P 495; State ex rel. Cutts v. Hart, 56 M 571, 573, 185 P 769, 7 ALR 1678; State v. Uotila and Certain Intox. Liquors, 71 M 351, 355, 229 P 724; State ex rel. Morgan v. Knight, 76 M 71, 77, 245 P 267; State ex rel. Wallace v. Callow, 78 M 308, 318, 254 P 187; State ex rel. Foot v. Rogge, 80 M 1, 7, 257 P 1029; Maddox v. Board of State Canvassers, 116 M 217, 224, 149 P 2d 112; State ex rel. Koch v. Lexcen, 131 M 161, 308 P 2d 974, 975.

Collateral References

Officers©=55(1).

67 C.J.S. Officers §49.

42 Am. Jur. 974, Public Officers, §§ 129 et seq.; 43 Am. Jur. 30, Public Officers, §§ 181 et seq.

Right to jury trial in proceeding for removal of public officer. 3 ALR 232 and 8 ALR 1476.

Physical or mental disability as disqualification or ground of removal or impeachment of public officer. 28 ALR 777.

Conclusiveness of governor's decision in removing officer, 52 ALR 7 and 92 ALR

Refusal of public officer to answer questions during an investigation as ground for removal. 77 ALR 616.

Nepotism as a ground for removal of public officer. 88 ALR 1103.

Implied power of appointing authorities to remove an officer whose tenure is not prescribed by law, but who has been appointed for a definite term. 91 ALR 1097.

Power to remove public officer without

notice and hearing. 99 ALR 336.

Mistreatment of prisoner as ground for removal of sheriff or other police officer. 100 ALR 1401.

Power of courts or judges in respect of removal of officers. 118 ALR 170.

Failure of public officer or employee to pay creditors on claims not related to his

office or position as ground for removal or suspension. 127 ALR 495.

Acquiescence or delay as affecting rights of public employee illegally discharged, suspended, or transferred. 145

Earnings or opportunity of earning from other sources as reducing claim of public officer or employee wongfully excluded from his office or position. 150 ALR 100.

Conviction of offense under federal law or law of another state or country as ground for removal from state or local office. 20 ALR 2d 732.

Assertion of immunity as ground for removing public officer. 44 ALR 2d 789.

What is an infamous crime or one involving mortal turpitude constituting disqualification to hold public office. 52 ALR 2d 1314.

What amounts to a conviction within the statute prescribing grounds for removal of public officers. 71 ALR 2d 593.

Losses incurred by deprival of office as damages recoverable by successful plaintiff or relator in mandamus, 73 ALR 2d

Acceptance of, or assertion of right to, pension or retirement as abandonment of public office or employment. 76 ALR 2d

(512) Notice of removal, by and to whom given. Whenever an officer is removed, declared insane, or convicted of a felony or offense involving moral turpitude, or a violation of his official duty, or whenever his election or appointment is declared void, the body, judge, or officer before whom the proceedings were had must give notice thereof to the officer authorized to fill the vacancy.

History: En. Sec. 1102, Pol. C. 1895; re-en. Sec. 421, Rev. C. 1907; re-en. Sec. 512, R. C. M. 1921. Cal. Pol. C. Sec. 997.

References

State ex rel. Flynn v. Ellis, 110 M 43. 50, 98 P 2d 879.

Collateral References

Officers 57. 67 C.J.S. Officers § 53. 43 Am. Jur. 50, Public Officers, §§ 211 et seq.

59-604. (513) Vacancies in legislative assembly, how filled. Whenever a vacancy, or failure to elect by reason of a tie vote occurs in either house of the legislative assembly, the governor must at once issue a writ of election to fill such vacancy.

History: En. Sec. 1103, Pol. C. 1895; re-en. Sec. 422, Rev. C. 1907; re-en. Sec. 513, R. C. M. 1921. Cal. Pol. C. Sec. 998.

NOTE.—See State Constitution, Art. V, Sec. 45.

References

State ex rel. Cutts v. Hart, 56 M 571, 573, 185 P 769, 7 ALR 1678; State ex rel. Greene v. Anderson, County Clerk, 113 M 582, 587, 129 P·2d 874.

Collateral References

States 28. 81 C.J.S. States § 33.

59-605. (514) Vacancies, how filled when not otherwise provided for. When any office becomes vacant, and no mode is provided by law for filling such vacancy, the governor must fill such vacancy by granting a commission, to expire at the end of the next legislative assembly or at the next election by the people.

History: En. Sec. 1104, Pol. C. 1895; re-en. Sec. 423, Rev. C. 1907; re-en. Sec. 514, R. C. M. 1921. Cal. Pol. C. Sec. 999.

Not Applicable to Legislative Vacancies

In view of section 45, Article V, and section 29, Article III, of the Constitution, the method provided by this section for filling vacancies in office where no other "mode" is provided by law has no application to a legislative vacancy. State ex rel. Cutts v. Hart, 56 M 571, 574, 185 P 769, 7 ALR 1678, explained in 113 M 582, 587, 129 P 2d 874.

This section does not, in view of Article V, section 45, and Article III, section 29, of the Constitution, authorize an appointment by the governor to fill a legislative vacancy, even though such vacancy occurred during a session of the legislature, and an appointment made by the governor to fill such a vacancy is contrary to the constitutional provisions above cited; the appointee was, in such case, at most, only a de facto officer. State ex rel. Cutts v. Hart, 56 M 571, 574, 185 P 769, 7 ALR 1678, explained in 113 M 582, 587, 129 P 2d 874.

Operation and Effect

This section applies to all cases of vacancies where no mode is provided by law for filling the same. While the consent of the state board of land commissioners to an appointment by the governor is necessary where a person is appointed to succeed one whose term has expired,

where a vacancy is to be filled in the office of state land agent the special provision relating to vacancies obtains, and the governor alone must appoint, by granting a commission until the end of the next session of the legislature. State ex rel. Neill v. Page 20 M 238, 247, 50 P 719.

References

State ex rel. Greene v. Anderson, 113 M 582, 587, 129 P 2d 874.

Collateral References

Officers 57. 67 C.J.S. Officers § 51. 42 Am. Jur. 974, Public Officers, §§ 129 et seq.

59-606. (515) Vacancies occurring during recess of the legislative assembly. Vacancies occurring in office during the recess of the legislative assembly, the appointment to which is vested in the governor and the senate, or in the legislative assembly, must be filled by appointment made by the governor; but the person so appointed can only hold the office until the adjournment of the next session of the legislative assembly.

History: En. Sec. 1105, Pol. C. 1895; re-en. Sec. 424, Rev. C. 1907; re-en. Sec. 515, R. C. M. 1921. Cal. Pol. C. Sec. 1000.

References

State ex rel. Neill v. Page, 20 M 238, 245, 50 P 719.

Collateral References

Officers 57, 59. 67 C.J.S. Officers §§ 51, 52. 42 Am. Jur. 982, Public Officers, § 142.

59-607. (516) Vacancies in certain state offices, how filled. A vacancy in the office of either the secretary of state, state auditor, state treasurer, attorney general, clerk of the supreme court, or superintendent of public instruction, must be filled by a person appointed by the governor, who holds his office until the first Monday in January next after a general election. At such election the office must be filled by election for the unexpired term.

History: En. Sec. 1106, Pol. C. 1895; re-en. Sec. 425, Rev. C. 1907; re-en. Sec. 516, R. C. M. 1921, Cal. Pol. C. Sec. 1001.

59-608. (517) **Powers and duties of officer filling unexpired term.** Any person elected or appointed to fill a vacancy, after filing his official oath and bond, possesses all the rights and powers, and is subject to all the liabilities, duties, and obligations, as if he had been elected to the office for a full term.

History: En. Sec. 1107, Pol. C. 1895; re-en. Sec. 426, Rev. C. 1907; re-en. Sec. 517, R. C. M. 1921. Cal. Pol. C. Sec. 1004. Collateral References
Officers 103.
67 C.J.S. Officers § 103.

CHAPTER 7

THE FISCAL YEAR-OFFICIAL REPORTS

Section 59-701. Fiscal year.

59-701.1. Reappropriation and re-encumbrance of purchase orders encumbered at end of each fiscal year.

59-701.2. Claims not paid by time fiscal reports closed out are carried over.

59-702 to 59-704. Repealed.

59-705. Semiannual reports. 59-706. Semiannual reports of property on hand. 59-707. Secretary of state to provide blanks. 59-708. Penalty.

59-701. (518) Fiscal year. The fiscal year for state purposes commences on the first (1st) day of July of each year, and ends on the last day of June of each year. The fiscal year for county purposes commences on the first (1st) day of July of each year and ends on the last day of June of each year. At the close of each fiscal year each state office, department, bureau, commission, institution, university unit, and agency shall make a determination of its financial condition and the results of its operations for such fiscal year, and the fiscal records of such state office, department, bureau, commission, institution, university unit, or agency for such fiscal year shall be closed out not later than the end of each fiscal year, and the trial balances of the accounts of such state office, department, bureau, commission, institution, university unit, and agency shall be transmitted to the state controller so as to be received by him not more than ten (10) days following the close of each fiscal year.

History: En. Sec. 3821, Pol. C. 1895; re-en. Sec. 2594, Rev. C. 1907; amd. Sec. 1, Ch. 73, L. 1921; re-en. Sec. 518, R. C. M. 1921; amd. Sec. 1, Ch. 121, L. 1953; amd. Sec. 1, Ch. 84, L. 1955; amd. Sec. 2, Ch. 127, L. 1961.

Collateral References Time@=4. 86 C.J.S. Time 8 9.

59-701.1. Reappropriation and re-encumbrance of purchase orders encumbered at end of each fiscal year. Accounting control of all purchase orders issued by the state controller which are encumbered at the end of each fiscal year in the state controller's accounts, because of incompletion of the contract, shall be reappropriated and re-encumbered in the succeeding fiscal year.

History: En. Sec. 2, Ch. 84, L. 1955.

Claims not paid by time fiscal reports closed out are carried over. Any just claims not paid within the fiscal year shall become payable from the succeeding year's appropriation, providing, however, that such claims shall not exceed the appropriation made for the preceding biennium.

History: En. Sec. 3, Ch. 84, L. 1955; amd. Sec. 3, Ch. 127, L. 1961.

59-702 to 59-704. (519 to 521) Repealed—Chapter 80, Laws of 1961.

Repeal

These sections (Sec. 1, p. 94, L. 1899; Sec. 1, Ch. 12, L. 1907; Sec. 1, Ch. 9, L. 1921; Sec. 1, Ch. 131, L. 1921; Sec. 1, Ch. 146, L. 1933; Sec. 1, Ch. 33, L. 1937; Sec.

4, Ch. 46, L. 1937; Sec. 1, Ch. 98, L. 1957; Sec. 1, Ch. 64, L. 1957; Sec. 1, Ch. 85, L. 1959), relating to reports of state officers and agencies, were repealed by Sec. 14, Ch. 80, Laws 1961. 59-705. (522) Semiannual reports. An account must be kept by the officers of the executive department and of all public institutions of the state of all moneys received severally from all sources, and for every service performed and of all moneys disbursed, and a semiannual report must be made to the governor under oath.

History: En. Sec. 314, Pol. C. 1895; re-en. Sec. 446, Rev. C. 1907; re-en. Sec. 522, R. C. M. 1921.

Collateral References States © 75, 82. 81 C.J.S. States §§ 57, 102.

59-706. (523) Semiannual reports of property on hand. It shall be the duty of every state officer or official, and the person in charge of every state institution, other than educational, to make out and file with the secretary of state semiannual reports of all property belonging to the state, in his possession, the first report showing the amount of all kinds of property on hand, and each subsequent report showing balance on hand last report, amount received or purchased, amount used, broken or destroyed, and balance on hand.

History: En. Sec. 1, Ch. 56, L. 1905; re-en. Sec. 447, Rev. C. 1907; re-en. Sec. 523, R. C. M. 1921.

Collateral References States \$\infty\$ 82, 87. 81 C.J.S. States \$\\$ 102, 105.

59-707. (524) Secretary of state to provide blanks. It shall be the duty of the secretary of state to provide blanks for property reports by state officers or officials, and for boards of trustees or managers to provide blanks for property reports of the institutions of which they have charge.

History: En. Sec. 2, Ch. 56, L. 1905; re-en. Sec. 448, Rev. C. 1907; re-en. Sec. 524, R. C. M. 1921.

Collateral References States 73, 82. 81 C.J.S. States §§ 64, 102.

59-708. (525) **Penalty.** Failure to comply with the provisions of the two preceding sections shall constitute a misdemeanor, and shall be punished by a fine of not less than five nor more than twenty-five dollars.

History: En. Sec. 3, Ch. 56, L. 1905; re-en. Sec. 449, Rev. C. 1907; re-en. Sec. 525, R. C. M. 1921.

Collateral References States \$\infty\$=81. 81 C.J.S. States \\$85.

CHAPTER 8

MILEAGE OF PUBLIC OFFICERS

Section 59-801. Mileage of all officers.

59-802. Same—liability of approving board for exceeding authorized amount—use of railroad or bus required if suitable.

59-801. (4884) Mileage of all officers. Members of the legislative assembly, state officers, township officers, jurors, witnesses, county agents, and all other persons, except sheriffs, who may be entitled to mileage, when using their own automobiles in the performance of official duties, shall be entitled to collect mileage at a rate of eight cents (8¢) per mile for the distance actually traveled, and no more unless otherwise specifically provided by law; provided, however, that nothing herein contained shall be construed as affecting the validity of section 43-310.

History: En. Sec. 4590, Pol. C. 1895; re-en. Sec. 3111, Rev. C. 1907; re-en. Sec. 4884, R. C. M. 1921; amd. Sec. 1, Ch. 16, L. 1933; amd. Sec. 1, Ch. 121, L. 1941; amd. Sec. 1, Ch. 201, L. 1947; amd. Sec. 1, Ch. 93, L. 1949; amd. Sec. 1, Ch. 124, L. 1951; amd. Sec. 1, Ch. 106, L. 1961.

Cross-Reference

Limitation on expenditures for traveling expenses, sec. 25-508.

1933 Amendment Invalid as to Witness Fees

On motion to retax costs seeking to reduce witness fees from ten to seven cents per mile to conform to Sec. 1. Ch. 16, Laws 1933, the 1933 amendment was held invalid as to attempted reduction of witness fees as title did not include word "witnesses." Witness fees are fixed by section 25-404 at seven cents per mile. Coolidge v. Meagher, 100 M 172, 182, 46 P 2d 684.

County Surveyor

Under the law as it stood in 1898, a county surveyor was not entitled to mileage. Wade v. Lewis and Clark County, 24 M 335, 337, 61 P 879. See also State ex rel. McGrade v. District Court, 52 M 371, 376, 157 P 1157.

Mileage Payable Is "Earnings" within Exemption Statute

Mileage payable to a county assessor for official travel constitutes "earnings" within the meaning of section 93-5816 exempting earnings necessary for debtor's family, the term being broader than "wages" and "salary." Williams v. Sorenson, 106 M 122, 127, 75 P 2d 784.

Collateral References

States \bigcirc 62 et seq. and other specific topics.

81 C.J.S. States § 89.

59-802. (4884.1) Same—liability of approving board for exceeding authorized amount—use of railroad or bus required if suitable. Whenever it shall be necessary for any state or county officer or employee to use his own automobile in the performance of any official duty where traveling expense is allowed by law, such officer or employee, except sheriffs, shall receive eight cents $(8\not\in)$ per mile for each mile necessarily traveled unless otherwise specifically provided by law and the members of any lawful approving board shall be liable upon their official bonds, for any claim which they may allow in excess of such amount; provided, however, that nothing herein contained shall be construed as affecting the validity of section 43-310. Provided, further, that in no case shall an automobile be used as herein provided if suitable transportation can be had by railroad or bus.

History: En. Sec. 1, Ch. 80, L. 1923; amd. Sec. 3, Ch. 16, L. 1933; amd. Sec. 2, Ch. 121, L. 1941; amd. Sec. 2, Ch. 201, L. 1947; amd. Sec. 2, Ch. 93, L. 1949; amd. Sec. 2, Ch. 124, L. 1951; amd. Sec. 2, Ch. 106, L. 1961.

Collateral References

Counties 73, 96; States 62, 80(1). 20 C.J.S. Counties §§ 129, 156; 81 C.J.S. States §§ 86, 89.

CHAPTER 9

STATE BOARD OF EXAMINERS TO FIX NUMBER, SALARY AND TERM OF ASSISTANTS TO STATE OFFICERS

Section 59-901. Number, compensation and tenure of employees of civil executive state offices fixed by board of examiners.

59-902. Civil executive state officer may appoint own employees—board of health employees.

59-901. Number, compensation and tenure of employees of civil executive state offices fixed by board of examiners. The state board of examiners of the state of Montana shall by resolution, fix and designate the number, compensation, term and tenure of office of all assistants, deputies, agents, attorneys, administrators, engineers, experts, clerks, accountants,

stenographers and executive attaches of all civil executive state offices, boards, commissions, bureaus and departments of the state of Montana; provided, however, that an increase or decrease in compensation of any state employee covered by the personnel administration law shall be approved by the personnel commission.

History: En. Sec. 1, Ch. 30, L. 1943; amd. Sec. 2, Ch. 176, L. 1949; amd. Sec. 17, Ch. 251, L. 1953.

Compiler's Note

Personnel administration law, referred to above, is compiled as sees. 59-1201 to 59-1215.

Cross-Reference

Salary of deputy field agents, clerks and employees of department of lands and investments determined under this section, sec. 81-209.

Civil executive state officer may appoint own employees—board of health employees. The civil executive state offices, boards, commissions. bureaus and departments of the state of Montana and the heads of state institutions, with the exception of state educational institutions under the jurisdiction of the state board of education, shall have the power to appoint their own employees of the several classes enumerated in section 59-901, in the manner and for the compensation fixed by the state board of examiners. Such civil executive state officers, boards, commissions, bureaus, departments and the heads of the institutions designated above shall have the power to discontinue the services of any of said employees; provided, however, that the state board of health, unemployement compensation commission and the department of public welfare shall in the appointment and discharge of such assistants, deputies, agents, attorneys, administrators, engineers, experts, clerks, accountants, stenographers and executive attaches, conform to and abide by all statutes of the United States of America relating to the establishment and maintenance of personnel standards on a merit basis for the said board, commission and department.

History: En. Sec. 2, Ch. 30, L. 1943.

CHAPTER 10

VACATIONS OF EMPLOYEES

Section 59-1001. Annual vacation leave.

59-1002. Accumulation of leave.

59-1003. Separation from service or transfer to other department—cash for unused vacation leave.

59-1004. Leave of absence exceeding fifteen days—vacation leave does not accrue.

59-1005. Absence because of illness not chargeable against vacation.

59-1006. Determination of vacation dates.

59-1007. Persons excepted from act.

59-1001. Annual vacation leave. Each employee of the state, or any county or city thereof, who shall have been in continuous employment and service of the state, county or city thereof, for a period of one (1) year from the date of employment is entitled to and shall be granted annual vacation leave with full pay at the rate of one and one-quarter $(1\frac{1}{4})$ working days for each month of service.

History: En. Sec. 1, Ch. 131, L. 1949; amd. Sec. 1, Ch. 152, L. 1951.

20 C.J.S. Counties § 109; 62 C.J.S. Municipal Corporations § 721; 81 C.J.S. States § 91.

Collateral References

Counties 69(1); Municipal Corporations \$\infty 220(5); States \$\infty 57.

59-1002. Accumulation of leave. Such annual vacation leave may be accumulated to a total not to exceed thirty working days.

History: En. Sec. 2, Ch. 131, L. 1949.

Separation from service or transfer to other department—cash for unused vacation leave. An employee, who is separated from the service of the state, or any county or city thereof, for reason not reflecting discredit on himself, or any employee transferred to or employed in another division or department of the state, or any county or city thereof, shall be entitled upon the date of such separation from, transfer to or acceptance of new employment within the state, county, or city service, to cash compensation for unused vacation leave.

History: En. Sec. 3, Ch. 131, L. 1949.

59-1004. Leave of absence exceeding fifteen days—vacation leave does not accrue. Vacation leave shall not accrue during a leave of absence without pay, the duration of which exceeds fifteen (15) days.

History: En. Sec. 4, Ch. 131, L. 1949.

59-1005. Absence because of illness not chargeable against vacation. Absence from employment by reason of illness shall not be chargeable against annual vacation leave.

History: En. Sec. 5, Ch. 131, L. 1949.

59-1006. Determination of vacation dates. The dates when employees' annual vacation leaves shall be granted shall be determined by agreement between each employee and his employing agency, with regard to the best interest of the state, any county or city thereof, as well as the best interests of each employee.

History: En. Sec. 6, Ch. 131, L. 1949.

59-1007. Persons excepted from act. The term "employee," as used herein, does not refer to or include elected state, county, or city officials, or schoolteachers.

History: En. Sec. 7, Ch. 131, L. 1949.

CHAPTER 11

FEDERAL SOCIAL SECURITY ACT-COVERAGE OF CERTAIN OFFICERS AND EMPLOYEES

Section 59-1101. Declaration of policy. 59-1102. Definitions.

59-1102.1. Referendum and certification.

59-1103. Federal-state agreement.

59-1103.1. Contributions by state employees.

59-1104. Plans for coverage of employees of political subdivisions. 59-1105. Contribution fund.

59-1106. Costs of administration. 59-1107. Rules and regulations.

59-1108. Persons excepted from act.

59-1109. Supplementation of social security benefits.

59-1110. Eligibility of staff and teachers—payroll deductions.
 59-1111. For purposes of act, each state institution of higher education deemed to have a separate retirement system—referendum—administration.

59-1112. Social security coverage not to prejudice other rights under other laws.

59-1113. General repeal—purpose.

59-1101. Declaration of policy. In order to extend to employees of the state and its political subdivisions, including employees of the state and its political subdivisions who are members of the public employees' retirement system of the state of Montana, and to the dependents and survivors of such employees, the basic protection accorded to others by the old age and survivors' insurance system embodied in the Social Security Act, it is hereby declared to be the policy of the legislature, subject to the limitations of this act, that such steps be taken as to provide such protection to employees of the state and its political subdivisions on as broad a basis as is permitted under the Social Security Act. It is also the policy of the legislature that the protection afforded employees in positions covered by the public employees' retirement system of the state of Montana on the date and agreement under this act is made applicable to service performed in such positions, or receiving periodic benefits under such retirement system at such time, will not be impaired as a result of making the agreement so applicable or as a result of legislative enactment in anticipation thereof.

History: En. Sec. 1, Ch. 44, L. 1953; amd. Sec. 1, Ch. 270, L. 1955.

NOTE.—The Social Security Act referred to in this section will be found in the United States Code, Title 42, sec. 301 et seq.

Collateral References

States 57. 81 C.J.S. States § 91. 48 Am. Jur. 520, Social Security Unemployment Insurance and Retirement Funds, §§ 9 et seq.

Acceptance of, or assertion of right to, pension or retirement as abandonment of public office or employment. 76 ALR 2d 1312.

59-1102. Definitions. For the purposes of this act—

(a) The term "wages" means all remuneration for employment as defined herein, including the cash value of all remuneration paid in any medium other than eash, except that such term shall not include that part of such remuneration which, even if it were for "employment" within the meaning of the Federal Insurance Contributions Act, would not constitute "wages" within the meaning of that act;

(b) The term "employment" means any service performed by an employee in the employ of the state, or any political subdivision thereof, for such employer, except (1) service which in the absence of an agreement entered into under this act would constitute "employment" as defined in the Social Security Act; or, (2) service which under the Social Security Act may not be included in an agreement between the state and the secretary of health, education and welfare entered into under this

- act. Service performed by civilian employees of national guard units is specifically included within the term "employment." Service which under the Social Security Act may be included in an agreement only upon certification by the governor in accordance with section 218(d)(3) of that act shall be included in the term "employment" if and when the governor issues, with respect to such service, a certificate to the secretary of health, education, and welfare pursuant to section 59-1102.1(b);
- (c) The term "employee" includes an elective or appointive officer or employee of the state or a political subdivision thereof;
- (d) The term "state agency" means the board of administration of the public employees' retirement system of the state of Montana;
- (e) The term "secretary of health, education, and welfare" means the secretary of the United States department of health, education, and welfare and includes any individual to whom the secretary of health, education, and welfare has delegated any of his functions under the Social Security Act with respect to coverage under such act of employees of states and their political subdivisions, and with respect to any action taken prior to April 11, 1953, includes the federal security administrator and any individual to whom such administrator had delegated any such function;
- (f) The term "political subdivision" includes an instrumentality of the state, of one or more of its political subdivisions, or of the state and one or more of its political subdivisions, including leagues or associations thereof, but only if such instrumentality is a juristic entity which is legally separate and distinct from the state or subdivision and only if its employees are not by virtue of their relation to such juristic entity employees of the state or subdivision. The term shall include special districts or authorities created by the legislature or local governments such as but not limited to school districts, housing authorities, etc.;
- (g) The term "Social Security Act" means the act of Congress approved August 14, 1935, chapter 531, 49 Stat. 620, officially cited as the "Social Security Act," (including regulations and requirements issued pursuant thereto), as such act has been and may from time to time be amended; and
- (h) The term "Federal Insurance Contributions Act" means subchapter A of chapter 9 of the Federal Internal Revenue Code of 1939 and subchapters A and B of chapter 21 of the Federal Internal Revenue Code of 1954, as such codes have been and may from time to time be amended; and the term "employee tax" means the tax imposed by section 1400 of such Code of 1939 and section 3101 of such Code of 1954, and as such codes may from time to time be amended.

History: En. Sec. 2, Ch. 44, L. 1953; amd. Sec. 2, Ch. 270, L. 1955.

NOTE.—Section 218 of the Social Security Act referred to in this section will be found in the United States Code, Title 42, sec. 418.

Subchapter A of Chapter 9 of the Federal Internal Revenue Code of 1939 referred to in this section is superseded by subchapters A and B of Chapter 21 of the

Federal Internal Revenue Code of 1954, known as the Federal Insurance Contributions Act, which is compiled in the United States Code as Title 26, sec. 3101 et seq.

Collateral References

Right to unemployment compensation of retired employee receiving pension or the like. 32 ALR 2d 901.

- 59-1102.1. Referendum and certification. (a) Pursuant to section 218 (d)(6) of the Social Security Act, the public employees' retirement system of the state of Montana shall, for the purposes of this act, be deemed to constitute a separate retirement system with respect to the state and a separate retirement system with respect to each political subdivision having positions covered thereby. With respect to employees of the state the governor is empowered to authorize a referendum, and with respect to the employees of any political subdivision he shall authorize a referendum upon request of the governing body of such subdivision; and in either case the referendum shall be conducted, and the governor shall designate an agency or individual to supervise its conduct, in accordance with the requirements of section 218(d)(3) of the Social Security Act. on the question of whether service in positions covered by a retirement system established by the state or by a political subdivision thereof should be excluded from or included under this act. The notice of referendum required by section 218(d)(3)(C) of the Social Security Act to be given to employees shall contain or shall be accompanied by a statement, in such form and such detail as the agency or individual designated to supervise the referendum shall deem necessary and sufficient, to inform the employees of the rights which will accrue to them and their dependents and survivors, and the liabilities to which they will be subject, if their services are included under an agreement under this act.
- (b) Upon receiving evidence satisfactory to him that with respect to any such referendum the conditions specified in section 218(d)(3) of the Social Security Act have been met, the governor shall so certify to the secretary of health, education, and welfare.

History: En. as Sec. 3, Ch. 44, L. 1953 by Sec. 3, Ch. 270, L. 1955.

- 59-1103. Federal-state agreement. (a) The state agency, with the approval of the governor, is hereby authorized to enter on behalf of the state into an agreement with the secretary of health, education, and welfare, consistent with the terms and provisions of this act, for the purpose of extending the benefits of the federal old age and survivors' insurance system to employees of the state or any political subdivision thereof with respect to services specified in such agreement which constitute "employment" as defined in section 59-1102. Such agreement may contain such provisions relating to coverage, benefits, contributions, effective date, modification and termination of the agreement, administration, and other appropriate provisions as the state agency and secretary of health, education, and welfare shall agree upon, but, except as may be otherwise required or permitted by or under the Social Security Act as to the services to be covered, such agreement shall provide in effect that:
- (1) Benefits will be provided for employees whose services are covered by the agreement (and their dependents and survivors) on the same basis as though such services constituted employment within the meaning of title II of the Social Security Act;
- (2) The state will pay to the secretary of the treasury of the United States, at such time or times as may be prescribed under the Social

Security Act, contributions with respect to wages (as defined in section 59-1102, equal to the sum of the taxes which would be imposed by the Federal Insurance Contributions Act if the services covered by the agreement constituted employment within the meaning of that act;

- (3) Such agreement shall be effective with respect to services in employment covered by the agreement performed after a date specified therein but in no event may it be effective with respect to any such services performed prior to the first day of the calendar year in which such agreement is entered into or in which the modification of the agreement making it applicable to such services, is entered into, except that such effective date may be made retroactive to the extent permitted by section 218(f) of the Social Security Act, as defined herein;
- (4) All services which constitute employment as defined in section 59-1102 and are performed in the employ of the state by employees of the state, shall be covered by the agreement; and
- (5) All services which (A) constitute employment as defined in section 59-1102, (B) are performed in the employ of a political subdivision of the state, and (C) are covered by a plan which is in conformity with the terms of the agreement and has been approved by the state agency under section 59-1104 shall be covered by the agreement.

History: En. Sec. 3, Ch. 44, L. 1953; amd. and redes. as Sec. 4, Ch. 44, L. 1953 by Sec. 4, Ch. 270, L. 1955; amd. Sec. 1, Ch. 97, L. 1959.

NOTE.—Title II of the Social Security Act referred to in this section will be tound in the United States Code, Title 42, sec. 401 et seq. Section 218 appears as Title 42, sec. 418.

- 59-1103.1. Contributions by state employees. (a) Every employee of the state whose services are covered by an agreement entered into under section 59-1103 shall be required to pay for the period of such coverage, into the contribution fund established by section 59-1105, contributions, with respect to wages (as defined in section 59-1102), equal to the amount of employee tax which would be imposed by the Federal Insurance Contributions Act if such services constituted employment within the meaning of that act. Such liability shall arise in consideration of the employee's retention in the service of the state, or his entry upon such service, after the enactment of this act.
- (b) The contribution imposed by this section shall be collected by deducting the amount of the contribution from wages as and when paid, but failure to make such deduction shall not relieve the employee from liability for such contribution.
- (c) If more or less than the correct amount of the contribution imposed by this section is paid or deducted with respect to any remuneration, proper adjustments, or refund if adjustment is impracticable, shall be made, without interest, in such manner and at such times as the state agency shall prescribe.

History: En. as Sec. 5, Ch. 44, L. 1953 by Sec. 5, Ch. 270, L. 1955.

NOTE.—The Federal Insurance Contributions Act referred to in this section will be found in the United States Code, Title 26, sec. 3101 et seq.

59-1104. Plans for coverage of employees of political subdivisions. (a) Each political subdivision of the state shall submit for approval by the state agency a plan for extending the benefits of title II of the Social Security Act, in conformity with applicable provisions of such act, to employees of such political subdivision. Each such plan and any amendment thereof shall be approved by the state agency if it finds that such plan, or such plan as amended, is in conformity with such requirements as are provided in regulations of the state agency, except that no such plan shall be approved unless:

(1) it is in conformity with the requirements of the Social Security

Act and with the agreement entered into under section 59-1103;

(2) it provides that all services which constitute employment as defined in section 59-1102 and are performed in the employ of the political subdivisions by employees thereof, shall be covered by the plan, except that it may exclude services performed by individuals to whom section 218(c)(3)(C) of the Social Security Act is applicable;

(3) it specifies the source or sources from which the funds necessary to make the payments required by paragraph (1) of subsection (c) and by subsection (d) are expected to be derived and contains reasonable

assurance that such sources will be adequate for such purpose;

(4) it provides for such methods of administration of the plan by the political subdivision as are found by the state agency to be necessary for the proper and efficient administration of the plan;

(5) it provides that the political subdivision will make such reports, in such form and containing such information, as the state agency may from time to time require, and comply with such provisions as the state agency or the secretary of health, education, and welfare may from time to time find necessary to assure the correctness and verification of such

reports:

(6) it authorizes the state agency to terminate the plan in its entirety, in the discretion of the state agency, if it finds that there has been a failure to comply substantially with any provision contained in such plan, such termination to take effect at the expiration of such notice and on such conditions as may be provided by regulations of the state agency and may be consistent with the provisions of the Social Security Act.

(b) The state agency shall not finally refuse to approve a plan submitted by a political subdivision under subsection (a), and shall not terminate an approved plan, without reasonable notice and opportunity

for hearing to the political subdivision affected thereby.

(c)(1) Each political subdivision as to which a plan has been approved under this section shall pay into the contribution fund, with respect to wages (as defined in section 59-1102), at such time or times as the state agency may by regulation prescribe, contributions in the amounts and at the rates specified in the applicable agreement entered into by the state agency under section 59-1102.1.

(2) Each political subdivision required to make payment under paragraph (1) of this subsection shall, in consideration of the employee's retention in, or entry upon, employment after enactment of this act, impose upon each of its employees, as to services which are covered by

an approved plan, a contribution with respect to his wages (as defined in section 59-1102), not exceeding the amount of the employee tax which would be imposed by the Federal Insurance Contributions Act if such services constituted employment within the meaning of that act, and to deduct the amount of such contribution from his wages as and when paid. Contributions so collected shall be paid into the contribution fund in partial discharge of the liability of such political subdivision or instrumentality under paragraph (1) of this subsection. Failure to deduct such contribution shall not relieve the employee or employer of liability therefor.

(d) Delinquent payments due under paragraph (1) of subsection (c) may, with interest at the rate of six per centum (6%) per annum, be recovered by action in a court of competent jurisdiction against the political subdivision liable therefor, or may, at the request of the state agency, be deducted from any other moneys payable to such subdivision by any department, agency or fund of the state.

History: En. Sec. 4, Ch. 44, L. 1953; amd. and redes. as Sec. 6, Ch. 44, L. 1953 by Sec. 6, Ch. 270, L. 1955; amd. Sec. 2, Ch. 97, L. 1959.

found in the United States Code, Title 42, sec. 418. The Federal Insurance Contributions Act appears as Title 26, sec. 3101 et seg.

NOTE.—Section 218 of the Social Security Act referred to in this section will be

- 59-1105. Contribution fund. (a) There is hereby established a special fund to be known as the contribution fund. Such fund shall consist of and there shall be deposited in such fund: (1) all contributions, interest, and penalties collected under sections 59-1103.1 and 59-1104; (2) all moneys appropriated thereto by the legislative assembly of the state of Montana; (3) any property or securities and earnings thereof acquired through the use of moneys belonging to the fund; (4) interest earned upon any moneys in the fund; and (5) all sums recovered upon the bond of the custodian or otherwise for losses sustained by the fund and all other moneys received for the fund from any other source. All moneys in the fund shall be mingled and undivided. Subject to the provisions of this act, the state agency is vested with full power, authority and jurisdiction over the fund, including all moneys and property or securities belonging thereto, and may perform any and all acts whether or not specifically designated, which are necessary to the administration thereof and are consistent with the provisions of this act.
- (b) The contribution fund shall be established and held separate and apart from any other funds or moneys of the state and shall be used and administered exclusively for the purpose of this act. Withdrawals from such fund shall be made for, and solely for (A) payment of amounts required to be paid to the secretary of the treasury of the United States pursuant to an agreement entered into under section 59-1103; (B) payment of refunds provided for in section 59-1103.1; and (C) refunds of overpayments, not otherwise adjustable, made by a political subdivision or instrumentality.
- (c) From the contribution fund the custodian of the fund shall pay to the secretary of the treasury of the United States such amounts and at such time or times as may be directed by the state agency in accordance

with any agreement entered into under section 59-1102.1 and the Social Security Act.

- (d) The treasurer of the state shall be ex officio treasurer and custodian of the contribution fund and shall administer such fund in accordance with the provisions of this act and the directions of the state agency and shall pay all warrants drawn upon it in accordance with the provisions of this section and with such regulations as the state agency may prescribe pursuant thereto.
- (e) Each department of the state shall include in its operating budget for the next succeeding fiscal year, prepared and delivered to the controller in accordance with the provisions of law, an estimate of the amount which it will be required to contribute to the contribution fund.

History: En. Sec. 5, Ch. 44, L. 1953; amd. and redes. as Sec. 7, Ch. 44, L. 1953 by Sec. 7, Ch. 270, L. 1955.

59-1106. Costs of administration. All costs allocable to the administration of this chapter shall be charged to and paid to the general fund by each department of the state and by the participating divisions and instrumentalities and political subdivisions of the state pro rata according to their respective contributions.

History: En. Sec. 6, Ch. 44, L. 1953; amd. and redes. as Sec. 8, Ch. 44, L. 1953 by Sec. 8, Ch. 270, L. 1955.

59-1107. Rules and regulations. The state agency shall make and publish such rules and regulations, not inconsistent with the provisions of this act, as it finds necessary or appropriate to the efficient administration of the functions with which it is charged under this act.

History: En. Sec. 7, Ch. 44, L. 1953; amd. and redes. as Sec. 9, Ch. 44, L. 1953 by Sec. 9, Ch. 270, L. 1955.

59-1108. Persons excepted from act. This act shall not apply to, and there shall be excluded from the operation thereof, all employees of the state and of the political subdivisions thereof operating under the provisions of any retirement plan for firemen, policemen or highway patrolmen.

History: En. Sec. 8, Ch. 44, L. 1953; amd. and redes. as Sec. 10, Ch. 44, L. 1953 by Sec. 10, Ch. 270, L. 1955; amd. Sec. 3, Ch. 97, L. 1959.

Cross-Reference

Application to teachers and staff members in public schools and institutions of higher learning, secs. 59-1109 to 59-1113.

59-1109. Supplementation of social security benefits. Any school district of the state, may, upon the approval thereof being voted by the board of trustees, conduct and supervise a referendum pursuant to section 218 of the Federal Social Security Act, among the members of the staff and teachers of the school or schools under the jurisdiction of such board of trustees. If the majority of votes cast in any such referendum indicates that said staff and teachers approve, then such board of trustees shall certify to the state board of equalization (or such other agency as may be by legislation designated to administer such program and enter into agreements for extensions of social security coverage) that the conditions for

coverage by social security, required by section 218 of the Social Security Act have been complied with.

History: En. Sec. 1, Ch. 271, L. 1955. NOTE.—Section 218 of the Federal Social Security Act referred to in this section will be found in the United States Code, Title 42, sec. 418.

59-1110. Eligibility of staff and teachers—payroll deductions. Pursuant to such certification, the staff and teachers of any such district shall be eligible for coverage under the provisions of the Federal Social Security Act, and the fiscal officer of such district shall thereafter collect the contributions required under the Federal Social Security Act, section 218, by payroll deduction from the staff and teachers and from the school district as employer; and said funds and accounts shall be deposited with the state board of equalization, or such other agency as may be designated by the legislature to administer Social Security Act coverage in this state, and held in the contributions' fund as provided by sections 59-1101 to 59-1108.

History: En. Sec. 2, Ch. 271, L. 1955.

- 59-1111. For purposes of act, each state institution of higher education deemed to have a separate retirement system—referendum—administration. (a) For the purposes of this section of this act, there shall be deemed to be a separate retirement system for the teachers of each state institution of higher education in Montana, and each such institution and the teachers therein shall be treated separately and independently from the other such institutions and teachers.
- (b) On request of the president of any such institution, the governor shall designate an agency or individual to give notice of and supervise a referendum in the retirement system for that institution in compliance with the requisites therefore prescribed by section 218 of the Federal Social Security Act.
- (c) If the majority of votes cast in any such referendum indicates that the majority of voters desire it, then the governor shall certify to the federal secretary of health, education, and welfare that each of the conditions set forth in section 218 of the Social Security Act has been complied with in respect to the retirement system voting in that referendum.
- (d) Upon such certification the governor shall designate an official to enter into an agreement (or a modification or supplement to an existing agreement, or both such modification and supplement) with the appropriate officers of the federal government, pursuant to section 218 of the said Social Security Act, to secure coverage thereunder for the retirement system with respect to which such certification has been made. Such agreements may be made retroactive to the extent permissible under the Social Security Act.
- (e) The fiscal officer for each institution for whose retirement system an agreement has been so made shall collect the contributions required by said section 218 as follows: (1) from the teachers in the retirement system of that institution, by payroll deductions and (2) for the state from any appropriations for salaries, or otherwise made available, to the institution involved. In the absence of specific provision in the appropriations for, or budget of, such an institution for such contributions, the state

board of education shall designate the funds from which any such required contributions shall be made and the budgetary items to which they shall be allocated.

(f) In the event that any relevant provisions of federal law are amended or superseded, then the provisions hereof which relate to such law shall be applied to such amended law or such superseding law.

History: En. Sec. 3, Ch. 271, L. 1955.

NOTE.—Section 218 of the Federal Social Security Act referred to in this section will be found in the United States Code, Title 42, sec. 418.

Compiler's Note

The words "federal secretary of health; education, and welfare" in subsection (c) mean the secretary of the United States department of health, education, and wel-

59-1112. Social security coverage not to prejudice other rights under other laws. Nothing in this act shall be construed to prejudice or otherwise affect any rights, benefits, or privileges heretofore accrued under any other law of this state; it being the intent of this legislation to permit supplementation of present retirement benefits under existing law with social security benefits, and to permit members of teaching or staff personnel in any district or institution of higher education so electing to become a member of more than one retirement system, to receive credit under more than one system for the same service, and to receive benefits from more than one such system, and no benefits received under either system shall be deducted from any other or separate system.

History: En. Sec. 4, Ch. 271, L. 1955.

59-1113. General repeal—purpose. All acts and parts of acts in conflict herewith are hereby repealed to the extent of any such conflict, it being the purpose of this act to bring under the provisions of sections 59-1101 to 59-1108, or any act amendatory thereof, teachers and staff members of districts and institutions of higher education for supplemental social security coverage as provided by the Federal Social Security Act.

History: En. Sec. 5, Ch. 271, L. 1955.

CHAPTER 12

PERSONNEL ADMINISTRATION LAW

Section 59-1201. Title of act.

59-1202. General purpose.

Classified service-exceptions therefrom. 59-1203.

59-1204. Department of state personnel.

59-1205. Personnel commission.

59-1206. Duties of the commission.

59-1207. Meetings of the commission.

Director of personnel. 59-1208.

Duties of the director. 59-1209.

59-1210. Rules.

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Status of present employees. Certification of payrolls. 59-1212.

59-1213.

59-1214. Records of the department of state personnel.

59-1215. Appeals by the employees to the commission.

59-1201. Title of act. This act shall be known and may be cited as the "Personnel Administration Law."

History: En. Sec. 1, Ch. 251, L. 1953.

- 59-1202. General purpose. It is the general purpose of this act and the public policy of this state that:
- (a) Employment in the state government shall be based on merit and fitness.
- (b) Efficiency and economy shall be promoted through just and equitable incentives and conditions of employment.
- (c) That compensation be based on service rendered, or to be rendered and promotions be based on systematic tests and evaluations.
- (d) That uniformity in compensation of state employees for similar work shall be based on uniform classification of state employees.

History: En. Sec. 2, Ch. 251, L. 1953.

Collateral References

States 53. 81 C.J.S. States § 70.

- 59-1203. Classified service—exceptions therefrom. The classified service to which this act shall apply shall comprise all positions in all state offices, boards, commissions, bureaus, departments, institutions and agencies of the state of Montana, except the following:
- (1) The state legislature and all employees and officers of the state legislature.
- (2) All state officers elected by popular vote and persons appointed to fill vacancies in elective offices.
- (3) Members of boards and commissions and heads of departments appointed by the governor.
- (4) One principal assistant or deputy and one private secretary for each board or commission or head of a department appointed by the governor or elected.
- (5) Deputies, reporters, attaches and stenographers appointed by the judiciary.
 - (6) Attorneys appointed by the attorney general.
- (7) President, instructional and scientific staffs of all branches of the six (6) units of the university of Montana and student employees of such institutions.
 - (8) Patients or inmates employed in state institutions.
- (9) Persons employed in a professional or scientific capacity to make or conduct a temporary and special inquiry, investigation or examination on behalf of the legislature or a committee thereof, or on behalf of the governor.
 - (10) Officers and members of the militia.
- (11) Individuals, employees and agencies under the present joint merit system now effective in state agencies expending federal funds except that the position classification plan and the compensation plan shall apply to such employees.
- (12) Officers, employees and persons recommended by the personnel director and unanimously approved by the personnel commission.

History: En. Sec. 3, Ch. 251, L. 1953.

59-1204. Department of state personnel. There is hereby created a department of state personnel, the executive head of which shall be a director of personnel. In the department there shall be a personnel com-

mission of four (4) members, with the powers and duties hereinafter enumerated.

History: En. Sec. 4, Ch. 251, L. 1953.

59-1205. Personnel commission. There is hereby created a commission to be known as the personnel commission of the state of Montana. commission shall consist of four (4) members who shall be appointed by the governor and confirmed by the senate and shall hold office for the term of four (4) years except two (2) of the members first appointed who shall hold office for a term of two (2) years. The terms of office of the members of the commission appointed for terms of two (2) years shall expire March 1, 1955, and the terms of office of the members first appointed for terms of four (4) years shall expire March 1, 1957. Not more than two (2) of the members shall be from the same political party, and at all times one member shall be a state employee in the classified service. Any vacancy shall be filled by appointment subject to confirmation by the senate and a member appointed to fill a vacancy shall hold office for the remainder of the term for which his predecessor was appointed. The members of the commission shall receive per diem of ten dollars (\$10.00) and expenses as authorized and provided for by law. The governor shall appoint the members of the first commission within thirty (30) days after the effective date of this act. The commission shall elect one (1) of its members as chairman.

History: En. Sec. 5, Ch. 251, L. 1953.

- **59-1206. Duties of the commission.** In addition to the duties expressly set forth elsewhere in this law, the commission shall:
- (1) Appoint a director of personnel within ninety (90) days after the appointment of the first commission.
- (2) Represent the public interest in the improvement of personnel in the state service.
- (3) Make any investigation which it may consider desirable concerning the administration of personnel in the state service, and make recommendations to the director with respect thereto.
- (4) Make biennial reports and special reports and recommendations to the governor and legislature.
- (5) Establish a classification plan, and revise the same when necessary, for all positions in the state classified service.
- (6) Review the operation of the compensation plan when adopted by the Montana state legislature and make such recommendations to the legislative assembly deemed advisable by the commission to meet changing needs of the state service.
- (7) Make and adopt rules and regulations necessary to carry out the purposes of this act.

History: En. Sec. 6, Ch. 251, L. 1953.

59-1207. Meetings of the commission. The commission shall meet at such time and place in the state of Montana as shall be agreed on by a majority of the members. At least one meeting shall be held in each month.

Records and minutes of the meetings shall be kept by the director of personnel. Three (3) members shall constitute a quorum.

History: En. Sec. 7, Ch. 251, L. 1953.

59-1208. Director of personnel. The director of personnel shall have had at least three (3) years experience in the field of personnel administration, which experience shall have been gained in a public or private personnel organization. The director shall receive a salary of seven thousand dollars (\$7,000.00) per annum and shall hold office at the pleasure of the commission.

History: En. Sec. 8, Ch. 251, L. 1953.

- 59-1209. Duties of the director. The director, as executive head of the department, shall direct and supervise its administrative and technical activities. In addition to the duties imposed upon him elsewhere in this law, it shall be his duty:
- (1) To establish and maintain a roster of all employees in the state service, in which there shall be set forth, as to each employee, the class title, pay or status, changes in class title and other pertinent data.
- (2) To maintain a register of applicants and a record of their examinations.
- (3) To supervise and give the examinations to test the fitness of applicants for positions in the classified service.
- (4) To appoint, within the budget limitations of the personnel department, such employees of the department and such experts and special assistants as may be necessary to carry out effectively the provisions of this act.
- (5) To investigate from time to time the operation and effect of this law and of the rules made thereunder and to report his findings and recommendations to the commission.
- (6) To make an annual report regarding the work of the department, and such special reports as he may consider desirable, to the commission.
- (7) To conduct or direct the making of work load analyses for the purpose of determining the volume of work, and time required in the performance of such work necessary to fulfill the requirements of each separate department, board, institution or commission of the state government, and the grade level and numbers of employees necessary to the performance of the duties required of each department; and further to report the findings of such analyses to the commission.
- (8) To perform any other lawful acts which the personnel commission may consider necessary or desirable to carry out the purposes and provisions of this law.

History: En. Sec. 9, Ch. 251, L. 1953.

- 59-1210. Rules. The director of personnel shall prepare and submit to the commission rules, for adoption or rejection, for the classified service and amendments thereto. The rules shall provide:
- (1) For the preparation and revision of a position classification plan which shall establish a series of grades of positions based on progressively increasing weight of responsibility and difficulty or complexity of duties

performed by the incumbent of such position. All of the positions assigned to any given grade should, to the greatest possible degree, entail duties deemed essentially equal in weight of responsibility and difficulty or complexity of duties. After such classification has been approved by the commission, the director shall allocate the position of every employee in the classified service to one of the classes in the plan.

- (2) For the preparation and revision of a compensation plan for all employees in the classified service which plan shall be approved by the commission and submitted to the 1955 legislative assembly on or before the fifteenth (15th) day of the session. Any compensation plan, or revision thereof approved by the commission shall not become effective until it is adopted by the legislative assembly.
- (3) For examinations to test the fitness of applicants for positions in the classified service. Veterans' preference rights as provided by law shall be observed in examinations. Such examinations shall be announced publicly at least fifteen (15) days in advance of the final day fixed for the filing of applications therefor, and the notice shall be given in the manner fixed by the commission.
- (4) For promotions which shall give appropriate consideration to the applicant's qualifications, record of performance, seniority, and conduct.
- (5) For emergency employment for not more than thirty (30) days without examination with the consent of the director.
- (6) For reinstatement, without examination, within two (2) years only, with the approval of the personnel commission, of persons who resign in good standing or who are laid off from their positions without fault or delinquency on their part.
- (7) For keeping records of performance of all employees in the classified service, which service records may be considered in determining salary increases and decreases provided in the compensation plan.
- (8) For the development and operation of programs to improve the work effectiveness and morale of employees in the state service.
- (9) For such other rules and administrative regulations, not inconsistent with law, as may be necessary.

History: En. Sec. 10, Ch. 251, L. 1953.

59-1211. Duties of state officers and employees. All officers and employees of the state shall comply with and aid in all proper ways in carrying out the provisions of this law and the rules, regulations and orders thereunder. All officers and employees shall furnish any records or information which the director or commission may request for any purpose of this law. The director may institute and maintain any action or proceedings at law or in equity that he considers necessary or appropriate to secure compliance with this act and the rules and orders thereunder.

History: En. Sec. 11, Ch. 251, L. 1953.

59-1212. Status of present employees. Employees holding positions in the state service on the effective date of this act shall not be required to pass a qualifying examination to remain in their respective positions and

they shall not receive any reduction in compensation by reason of any classification of their position.

History: En. Sec. 12, Ch. 251, L. 1953.

59-1213. Certification of payrolls. No state disbursing or auditing officer shall make or approve or take any part in making or approving any payment for personal service to any person holding a position in the state classified service unless the payroll voucher or account of such pay bears the certification of the director, or of his authorized agent, that the persons named therein have been appointed and employed in accordance with the provisions of this law and the rules, regulations and orders thereunder. The director may for proper cause withhold certification from an entire payroll or from any specific item or items thereon.

History: En. Sec. 13, Ch. 251, L. 1953. NOTE.—Section 16 of Ch. 251, Laws 1953 read: "Effective date of section 13 of act. Section 13 hereof shall be in full force and effect from and after the first (1st) day of April, 1955, and no applicant for state employment for any position in the classified service shall be employed after the first (1st) day of April, 1955, who has not first qualified by examination as required under this act and the rules of the commission."

59-1214. Records of the department of state personnel. The records of the department, except such records as the rules may properly require to be held confidential for reasons of public policy, shall be public records and shall be open to public inspection, subject to reasonable regulations as to the time and manner of inspection which may be prescribed by the director.

History: En. Sec. 14, Ch. 251, L. 1953.

59-1215. Appeals by the employees to the commission. Any employee desiring a hearing on the classification assigned for his position may, within thirty (30) days after such classification, appeal to the commission for review thereof. Any action or decision by the commission may be appealed to the district court.

History: En. Sec. 15, Ch. 251, L. 1953.

CHAPTER 13

FACSIMILE SIGNATURES OF PUBLIC OFFICIALS

Section 59-1301. Definitions.

59-1302. Facsimile signature, 59-1303. Use of facsimile seal, 59-1304. Violation and penalt

59-1304. Violation and penalty. 59-1305. Uniformity of interpretation.

59-1306. Short title.

- 59-1301. Definitions. As used in this act: (a) "Public security" means a bond, note, certificate of indebtedness, or other obligation for the payment of money, issued by this state or by any of its departments, agencies, public bodies, or other instrumentalities or by any of its political subdivisions.
- (b) "Instrument of payment" means a check, draft, warrant, or order for the payment, delivery, or transfer of funds.
- (c) "Authorized officer" means any official of this state or any of its departments, agencies, public bodies, or other instrumentalities or any of

its political subdivisions whose signature to a public security or instrument of payment is required or permitted.

(d) "Facsimile signature" means a reproduction by engraving, imprinting, stamping, or other means of the manual signature of an authorized officer.

History: En. Sec. 1, Ch. 260, L. 1959.

NOTE.—Uniform State Law. Sections 59-1301 through 59-1306 constitute the "Uniform Facsimile Signatures of Public Officials Act" approved by the National Conference of Commissioners on Uniform

State Laws, August 23, 1958 and adopted by the states of Arkansas, California, Idaho, Illinoins, Maryland, Missouri, New Hampshire, New Mexico, Oklahoma, Pennsylvania, Texas and Wyoming.

- 59-1302. Facsimile signature. Any authorized officer, after filing with the secretary of state or, in the case of officers of any city, town, county, school district or other political subdivision, with the clerk of such subdivision, his manual signature certified by him under oath, may execute or cause to be executed with a facsimile signature in lieu of his manual signature:
- (a) Any public security, provided that at least one signature required or permitted to be placed thereon shall be manually subscribed, but no such manual subscription shall be required as to interest coupons attached to such security; and
 - (b) Any instrument of payment.

Upon compliance with this act by the authorized officer, his facsimile signature has the same legal effect as his manual signature.

History: En. Sec. 2, Ch. 260, L. 1959.

59-1303. Use of facsimile seal. When the seal of this state or any of its departments, agencies, public bodies, or other instrumentalities or of any of its political subdivisions is required in the execution of a public security or instrument of payment, the authorized officer may cause the seal to be printed, engraved, stamped or otherwise placed in facsimile thereon. The facsimile seal has the same legal effect as the impression of the seal.

History: En. Sec. 3, Ch. 260, L. 1959.

- **59-1304.** Violation and penalty. Any person who with intent to defraud uses on a public security or an instrument of payment:
- (a) A facsimile signature, or any reproduction of it, of any authorized officer, or
- (b) Any facsimile seal, or any reproduction of it, of this state or any of its departments, agencies, public bodies, or other instrumentalities or of any of its political subdivisions is guilty of a felony.

History: En. Sec. 4, Ch. 260, L. 1959.

59-1305. Uniformity of interpretation. This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 14, Ch. 260, L. 1959.

59-1306. Short title. This act may be cited as the Uniform Facsimile Signatures of Public Officials Act.

History: En. Sec. 15, Ch. 260, L. 1959.

TITLE 60

OIL AND GAS

- Chapter 1. Conservation of oil and gas-commission (60-101 to 60-123 Repealed), 60-124 to 60-148.
 - Petroleum products-standards-regulation of manufacture and distribution, 60-201 to 60-222.
 - State manufacture and sale of petroleum products declared public purpose, 60-301 to 60-306.
 - Discrimination in price of petroleum products prohibited, 60-401 to 60-407.
 - Owners of royalty interests may compel accounting for royalty, 60-501, 60-502.
 - 6. Interstate compact for conservation of oil and gas authorized, 60-601 to 60-606.
 - Lease of land of local governmental units for development of oil and gas, 60-701 to 60-704.
 - Underground gas storage reservoirs, 60-801 to 60-805.

CHAPTER 1

CONSERVATION OF OIL AND GAS-COMMISSION

- Section 60-101 to 60-123. Repealed.
 - 60-124. Waste of oil and gas prohibited.
 - 60-125. Oil and gas conservation commission-members-term-oath-sealemployees.
 - 60-126. Definitions.
 - 60-127. Powers and duties of commission.
 - 60-128. Notice of intention to drill.
 - 60-129. Well spacing units-orders.
 - 60-130. Pooling of interest within spacing unit-voluntary or on order of commission after hearing-contents of order.
 - 60-131. Agreements for development and operation of pool-not in violation of state antitrust laws when approved by commission.
 - Rules and regulations—hearings—notice of hearings—emergency orders. 60-132.
 - 60-133. Subpoena power of commission-act does not abrogate civil actionsenforcement of act when commission fails to enjoin violations.
 - 60-134. Rehearing.
 - 60-135. Court review of order of commission by suit for injunction-trial de novo-temporary restraining order, when allowed, bond-appeals.
 - 60-136. Enjoining violations of act.
 - 60-137. Rules and regulations of the board of railroad commissioners and of oil conservation board not in conflict with this act remain effective.
 - Commission substituted for board of railroad commissioners and oil 60-138. conservation board in all agreements, contracts, proceedings, etc., pertaining to matters embraced in this act.
 - 60-139. Records of oil conservation board and board of railroad commissioners pertaining to matters embraced in this act become property of the commission-money in oil conservation board fund transferredtaxes, penalties, etc., saved from repealing clause.
 - Lands subject to act. 60-140.
 - 60-141. Co-operation with other governmental units and agencies.
 - 60-142. Penalties.
 - 60-143.
 - Act does not constitute oil or gas wells as public utilities. Owners shall make available to commission cores and cuttings. 60-144.
 - 60-145. Privilege and license tax, quarterly statements, penalties-drilling permit fees-oil and gas conservation fund.

[Petroleum field station of bureau of mines at Billings] Definitions. Transfer of jurisdiction and record. 60-146.

60-148. Availability of facilities to bureau.

60-101 to 60-123. (3552.1 to 3552.4; 3554.1 to 3554.19) **Repealed—Chap**ter 238. Laws of 1953.

Repeal

These sections (Secs. 1-4, Ch. 56, L. 1925, and Secs. 1-18, 20, Ch. 18, Ex. L. 1933; Sec. 1, Ch. 136, L. 1935; Secs. 1, 2, Ch. 123, L. 1937), relating to the oil conservation board, were repealed by Sec. 24, Ch. 238, Laws 1953, effective April 1, 1952. 1953. For present law, see secs. 60-124 to 60-145.

Section 14 of Ch. 238, Laws 1953 (60-137) kept in effect rules and regulations of the oil conservation board not in conflict with the new act. Section 15 of Ch. 238, Laws 1953 (60-138) substituted the oil and gas conservation commission for

the oil conservation board in any contracts, agreements, and proceedings to which the conservation board was a party. Section 16, Ch. 238, Laws 1953 (60-139) transferred the records of the oil conservation board to the new commission; transferred any money in the oil conservation board fund to the oil and gas conservation fund, and reserved from the repealing clause all the taxes, penalties, and interest and the right to collect the same due and payable to the oil conservation board at the time of the effective date of the new act.

60-124. Waste of oil and gas prohibited. Waste of oil and gas or either of them as waste is defined in this act, is prohibited.

History: En. Sec. 1, Ch. 238, L. 1953.

Collateral References

Mines and Minerals \$\sim 92. 58 C.J.S. Mines and Minerals § 229 et

Rights and remedies of owner or lessee of oil or gas land or mineral or royalty interest therein, in respect of waste of oil or gas through operations on other lands, 4 ALR 2d 198.

- 60-125. Oil and gas conservation commission—members—term—oath -seal-employees. A. There is hereby created the oil and gas conservation commission of the state of Montana.
- B. The oil and gas conservation commission of the state of Montana shall be composed of five (5) persons to be appointed by the governor, with the concurrence of the state senate. That of the commissioners, two (2) and not more than two (2) will be appointed for a period of two (2) years, and they shall be from industry. One (1) nonindustry man shall be appointed for three (3) years and one for four (4) years and one (1) for five (5) years. At the expiration of the term of the two (2) industry men, the appointment of their successors shall be for four (4) and five (5) years respectively, after which all vacancies shall be filled for five (5) year terms. All appointed members of the commission shall be subject to removal by the governor for cause at any time. In case of a vacancy in the office of a member of the commission, an appointment shall be made to fill such vacancy in the manner prescribed by the constitution of the state of Montana.
- C. Persons appointed as members of the commission shall have been bona fide residents of the state of Montana for at least one (1) year before such appointment, and the two (2) industry members, shall have had at least three (3) years' experience in the production of oil or gas.
- D. Each member appointed to the commission and each person appointed to office by the said commission before entering upon the duties of his office shall take and subscribe to the oath specified in section 1,

article 19, of the constitution of the state of Montana and such oaths shall be filed in the office of the secretary of state.

- E. The commission shall have a seal with the words engraved thereon: "Oil and Gas Conservation Commission of Montana," and such seal shall be affixed to all writs, authentication of records or other official proceedings of the commission. The courts of this state take judicial notice of such seal.
- F. The commission shall appoint an executive secretary and may employ such other persons as experts, geologists, petroleum engineers, attorneys, assistants, field supervisors, clerks and stenographers and may acquire such personal property as may be necessary to perform the duties that may be required of it, and fix the compensation of the executive secretary and employees. Each member of the commission shall receive, as compensation for his services, the sum of fifteen dollars (\$15.00) per day for each day actually engaged in the performance of the duties of his office, including time of travel between his home and the place at which he performs such duties, together with transportation and per diem expenses as provided by law in the discharge of said duties; provided, however, that the total expenditures of such commission shall not exceed in the aggregate during any fiscal year, the amount actually collected under the provisions of section 60-145, plus any amount appropriated for that purpose, or otherwise accruing to said fund.

History: En. Sec. 2, Ch. 238, L. 1953; amd. Sec. 1, Ch. 11, L. 1955.

- **60-126. Definitions.** As used in this act, unless the context otherwise requires:
- A. "Waste" means and includes (1) physical waste, as that term is generally understood in the oil and gas industry, (2) the inefficient, excessive, or improper use of, or the unnecessary dissipation of reservoir energy, (3) the location, spacing, drilling, equipping, operating or producing of any oil or gas well or wells in a manner which causes, or tends to cause, reduction in the quantity of oil or gas ultimately recoverable from a pool under prudent and proper operations, or which causes or tends to cause unnecessary or excessive surface loss or destruction of oil or gas and (4) the inefficient storing of oil or gas; provided, however, that the production of oil or gas from any pool or by any well to the full extent that such well or pool can be produced in accordance with methods designed to result in maximum ultimate recovery, as shall be determined by the commission, shall not be deemed to be waste within the meaning of this definition.
- B. "Commission" means the oil and gas conservation commission of Montana.
- C. "Person" means and includes any natural person, corporation, association, partnership, receiver, trustee, executor, administrator, guardian, fiduciary, or other representative of any kind, and includes any department, agency, or instrumentality of the state or any governmental subdivision thereof; the masculine gender, in referring to a person, includes the feminine and the neuter genders.

- D. "Oil" means and includes crude petroleum oil and other hydrocarbons regardless of gravity which are produced at the wellhead in liquid form by ordinary production methods, and which are not the result of condensation of gas before or after it leaves the reservoir.
- E. "Gas" means and includes all natural gases and all other fluid hydrocarbons as produced at the wellhead and not hereinabove defined as oil.
- F. "Pool" means an underground reservoir containing a common accumulation of oil or gas or both; each zone of a structure which is completely separated from any other zone in the same structure is a pool, as that term is used in this act.
 - G. "Field" means the general area underlaid by one or more pools.
- H. "Owner" means the person who has the right to drill into and produce from a pool and to appropriate the oil or gas he produces therefrom either for himself or others or for himself and others, and including all persons holding such authority by or through him.

Nothing herein contained shall be construed to conflict with subsection 4, of section 81-1702, granting state board of land commissioners the authority to enter into pooling and unitization agreements for the production of oil or gas with others.

- I. "Producer" means the owner of a well or wells capable of producing oil or gas or both.
- J. The word "and" includes the word "or" and the use of the word "or" includes the word "and." The use of the plural includes the singular and the use of the singular includes the plural.

History: En. Sec. 3, Ch. 238, L. 1953.

- 60-127. Powers and duties of commission. A. The commission has jurisdiction to exercise effectively the authority granted it by this act.
- B. The commission has authority, and it is its duty, to make such investigations as it deems proper to determine whether waste exists or is imminent or whether other facts exist which justify any action by the commission under the authority granted by this act with respect thereto.
 - C. The commission has authority, and it is its duty:
- (1) To require: (a) identification of ownership of oil or gas wells, producing properties and tanks, (b) the making and filing of acceptable well logs, reports on well locations, and the filing of directional surveys, if made, provided, however, that logs of exploratory or wildcat wells need not be filed for a period of six (6) months following completion of such wells, (c) the drilling, easing, producing and plugging of wells in such manner as to prevent the escape of oil or gas out of one stratum into another, the intrusion of water into oil or gas stratum, blowouts, cavings, seepages, and fires: and the pollution of fresh water supplies by oil, gas, salt, or brackish water, (d) the furnishing of a reasonable bond with good and sufficient surety, conditioned for performance of the duty to properly plug each dry or abandoned well, (e) proper gauging or other measuring of oil and gas produced and saved to determine the quantity and quality thereof, (f) that every person who produces, transports or stores oil or gas in this state shall make available within this state for a period of five (5) years complete and accurate records of the quantities

thereof, which records shall be available for examination by the commission or its agents at all reasonable times, and that every such person file with the commission such reports as it may prescribe with respect to quantities, transportations, and storages of such oil or gas.

- (2) For the purpose of preventing waste, (a) to regulate the drilling, producing and plugging of wells, the shooting and chemical treatment of wells, the spacing of wells, operations voluntarily entered into to increase ultimate recovery such as cycling of gas, the maintenance of pressure, and the introduction of gas, water, or other substances into producing formations and (b) to fix, upon application made by any interested person after hearing, efficient gas-oil and water-oil ratios for any particular well or wells.
 - (3) To regulate disposal of salt water and oil field wastes.
- (4) To classify wells as oil or gas wells for purposes material to the interpretation or enforcement of this act.
- (5) To promulgate and to enforce rules, regulations and orders to effectuate the purposes and the intent of this act.
- (6) To prepare and submit to the legislative assembly of the state of Montana, during its regular session, and not later than the fifth legislative day, a report of the activities of the commission, including among other things, a summary account of the moneys received and expended by the commission, the petitions which have been filed before it, and such specific recommendations as the commission shall deem proper as to legislative enactment which will further the oil development of the state of Montana, and properly regulate the oil industry and the commission.
- D. The commission shall have power and it shall be its duty to determine and prescribe what producing wells shall be defined as "stripper wells" and what wells shall be defined as "wild cat wells," and to make such orders as in its judgment shall be required to protect such wells, and to provide that stripper wells may be produced to capacity if it is deemed necessary in the interest of conservation so to do.
- E. With respect to any pool or pools from which gas was being produced by a gas well or gas wells on or prior to the date on which this act takes effect, this act shall never be so construed as to authorize the commission at any time to limit or restrain the rate (daily or otherwise) of production of gas from such pool or pools by any well then or hereafter drilled and producing from such pool or pools to less than the rate at which such well can be produced without adversely affecting the quantity of gas ultimately recoverable by such well.

History: En. Sec. 4, Ch. 238, L. 1953.

Collateral References

Mines and Minerals \$92.15.
58 C.J.S. Mines and Minerals § 240.

Law Reviews

Sullivan, "Survey of Oil and Gas Law in Montana as it Relates to the Oil and Gas Lease," 16 Mont. L. Rev. 1 (Spring 1955).

Symposium on Rocky Mountain Oil and Gas Law, 17 Mont. L. Rev. 1 (Fall 1955).

60-128. Notice of intention to drill. It shall be unlawful to commence the drilling of a well for oil or gas without first giving to the commission written notice of intention to drill, and obtaining a drilling permit as in this act hereafter provided.

History: En. Sec. 5, Ch. 238, L. 1953.

- 60-129. Well spacing units—orders. A. To prevent or to assist in preventing waste of oil or gas prohibited by this act, the commission, upon its own motion or upon application of any interested person, after hearing, may by order establish well spacing units for a pool, as to oil wells or as to gas wells or both, except in those pools which, prior to the effective date of this act, have been developed to such an extent that it would be impracticable or unreasonable to establish spacing units at the existing stage of development. Spacing units when established shall in so far as possible be of uniform size and shape for the entire pool.
- B. The size and the shape of spacing units are to be such as will result in the efficient and economic development of the pool as a whole, and the size shall be the area that can be efficiently drained by one well.
- C. Subject to the provisions of this act, the order establishing spacing units shall direct that no more than one (1) well shall be drilled and produced from the common source of supply on any spacing unit, and that the well shall be drilled at a location authorized by the order, with such exception as may be reasonably necessary where it is shown, upon application, notice, and hearing, and the commission finds, that the spacing unit is located on the edge of a pool or field and adjacent to a producing unit, or, for some other reason, the requirement to drill the well at the authorized location on the spacing unit would be inequitable or unreasonable.
- D. An order establishing spacing units for a pool shall cover all lands then determined or then believed to be underlaid by such pool and may be modified after notice and hearing by the commission from time to time to include additional areas subsequently determined to be underlaid by such pool. When found necessary for the prevention of waste, an order establishing spacing units in a pool may be modified after notice and hearing by the commission to increase or decrease the size of spacing units in the pool, or to permit the drilling of additional wells on a reasonably uniform plan in the pool.

History: En. Sec. 6, Ch. 238, L. 1953.

Other Estates," 14 Mont. L. Rev. 1 (Spring

Law Review

Shepherd, "Oil and Gas Leasehold and

60-130. Pooling of interest within spacing unit—voluntary or on order of commission after hearing—contents of order. A. When two (2) or more separately owned tracts are embraced within a spacing unit, or when there are separately owned interests in all or a part of the spacing unit, then the persons owning such interests may pool their interests for the development and operation of the spacing unit. In the absence of voluntary pooling, within the spacing unit, the commission, upon the application of any interested person, may enter an order pooling all interests in the spacing unit for the development and operation thereof. Each such pooling order shall be made after hearing, and shall be upon terms and conditions that are just and reasonable, and that afford to the owner of each tract or interest in the spacing unit the opportunity to recover or receive, without unnecessary expense, his just and equitable share of the oil or gas pro-

duced and saved from such spacing unit. Operations incident to the drilling of a well upon any portion of a spacing unit covered by a pooling order shall be deemed, for all purposes, the conduct of such operations upon each separately owned tract in the spacing unit by the several owners thereof. That portion of the production allocated to each tract included in a spacing unit covered by a pooling order shall, when produced, be deemed for all purposes to have been produced from such tract by a well drilled thereon.

B. Each such pooling order shall make provision for the drilling and operating of a well on the spacing unit, and for the payment of the cost thereof, which cost may include a reasonable charge for supervision, handling and storage. As to each owner who refuses to pay his share of the costs of drilling and operating the well, the order shall provide for payment of his share of the cost out of, and only out of, production from the well allocable to his interest in the spacing unit, excluding royalty or other interest not obligated to pay any part of the cost thereof. In the event of any dispute as to such cost, the commission shall determine the proper cost. The order may provide in substance that the owners who agree to share in the cost of drilling and operating the well shall, unless they agree otherwise, be entitled to receive, subject to royalty or similar obligations, all of the production of the well until they have recovered all of such costs out of such production and thereafter all of the owners in such spacing unit shall be entitled to receive their respective shares of the production of such well as their interest may appear after deducting their respective shares of current operating costs.

History: En. Sec. 7, Ch. 238, L. 1953.

Collateral References

Mines and Minerals € 92.23. 58 C.J.S. Mines and Minerals § 240.

Validity of compulsory pooling or unitization statute or ordinance requiring own-

ers or lessees of oil and gas lands to develop their holdings as a single drilling unit and the like. 37 ALR 2d 434.

Law Review

Hinkle, "Some Legal Aspects of the Unitization of Federal, State and Fee Lands," 14 Mont. L. Rev. 49 (Spring 1953).

60-131. Agreements for development and operation of pool—not in violation of state antitrust laws when approved by commission. An agreement for the unit or co-operative development and operation of a field or pool or any part of either, or for conducting repressuring or pressure maintenance operations, cycling or recycling operations, including the extraction and separation of liquid hydrocarbons from natural gas in connection therewith, or any other method of unit or co-operative operation, including water flooding, is authorized and may be performed. Such an agreement shall not be held or construed to violate any of the statutes of this state relating to trusts, monopolies or contracts and combinations in restraint of trade if the agreement is approved by the commission as being in the public interest and reasonably necessary to increase ultimate recovery or to prevent waste of oil or gas.

History: En. Sec. 8, Ch. 238, L. 1953.

Collateral References

Rights and remedies of owner or lessee of oil or gas land or mineral or royalty

interest therein, in respect of waste of oil or gas through operations on other lands. 4 ALR 2d 198.

- 60-132. Rules and regulations—hearings—notice of hearings—emergency orders. A. The commission shall prescribe rules and regulations governing the practice and procedure before the commission.
- B. No rule, regulation or order, or amendment thereof, except in an emergency, shall be made by the commission without a public hearing upon at least ten (10) days' notice. The public hearing shall be held at such time and place as may be prescribed by the commission, and any interested person shall be entitled to be heard.
- C. When an emergency requiring immediate action is found to exist, the commission is authorized to issue an emergency order without advance notice or hearing, which shall be effective upon promulgation. No emergency order shall remain effective more than fifteen (15) days.
- D. Any notice required by this act shall be given by the commission and such notice shall be given as follows:
- (1) In all cases where a complaint has been made by the commission or by any person that any provision of this act, or any rule, regulation or order of the commission, is being or has been violated, notice of the hearing to be held on such complaint shall be given to the interested persons by one of the following methods:
- (a) Personal service or service by publication in the manner as is now or shall hereafter be provided by law for the service of process in the civil action in the courts of this state; or
- (b) by certified or registered United States mail, with full first class postage prepaid thereon and addressed to the last known mailing address of the person or persons affected.
- (2) In all other cases by publication in one or more issues of a newspaper in general circulation in the state capitol [capital] and a newspaper of general circulation in the county where the land or some part thereon is situated, and it may also cause publication to be made in a trade journal or bulletin or [of] general circulation in the oil and gas industry in the state.

The date of service shall be the date on which service was made in the case of personal service; the date of last publication in the case of service of publication under subsection (a) of paragraph (1) above; the date of first publication in the case of notice by publication under the provisions of paragraph (2) above; and the date of mailing in the case of notice by mail under subsection (b) of paragraph (1) above.

The notice shall be issued in the name of the state of Montana, shall be signed by the chairman or the executive secretary of the commission, shall specify the style and number of the proceeding, and the time and place of hearing, and shall briefly state the purpose of the proceeding.

In cases of personal service such service may be made by any officer or person authorized by law to serve process, or by any agent of the commission, in the same manner as is now or may hereafter be provided by law for the service of process in a civil action in the district courts of this state.

Proof of personal service shall be made by the affidavit of the officer, person or agent of the commission making such personal service. Proof of service by publication shall be made by the affidavit of the printer or pub-

lisher of the newspaper, trade journal, or bulletin in which the notice is published, or by a foreman or principal clerk of such newspaper, bulletin or trade journal. Proof of service by mailing shall be made by the affidavit of the chairman or executive secretary of the commission.

In the case where personal service or services by publication is made as provided in section (a) of paragraph (1) above, the secretary of the commission shall for such purposes, be vested with the same power and charged with the same duties as the clerk of the district courts of this state.

- E. All rules, regulations and orders issued by the commission shall be in writing, shall be entered in full in books to be kept by the commission for that purpose, shall be indexed, and shall be public records open for inspection at all times during reasonable office hours. Except for orders establishing or changing rules of practice and procedure, all orders made and published by the commission shall include and be based upon written findings of fact entered and indexed as public records in the manner hereinabove provided. A copy of any rule, regulation, or order certified by the commission or its secretary shall be received in evidence in all courts of this state with the same effect as the original.
- F. Except as otherwise in this act provided, the commission may act upon its own motion, or upon the petition of any interested person. On the filing of a petition concerning any matter within the jurisdiction of the commission, the commission shall promptly fix a date for a hearing thereon, and shall cause notice of the hearing to be given. The hearing shall be held without undue delay after the filing of the petition. The commission shall enter its order within thirty (30) days after the hearing.

History: En. Sec. 9, Ch. 238, L. 1953; amd. Sec. 1, Ch. 213, L. 1961.

Compiler's Note

The compiler has inserted the bracketed words "capital" and "of" in subd. D(2).

60-133. Subpoena power of commission—act does not abrogate civil actions—enforcement of act when commission fails to enjoin violations. A. The commission shall have the power to subpoena witnesses, to administer oaths, and to require the production of records, books, and documents for examination at any hearing or investigation conducted by it. Subpoenaed witnesses shall be paid the same per diem and mileage as is provided to be paid to witnesses attending the district courts of this state.

B. Nothing in this act, and no suit by or against the commission, and no violation charged or asserted against any person under any provisions of this act, or any rule, regulation or order issued hereunder, shall impair or abridge or delay any cause of action for damages or other civil remedy, which any person may have or assert against any other person violating any provision of this act, or any rule, regulation, or order issued thereunder. Any person so aggrieved by the violation may sue for and recover such damages or relief as he otherwise may be entitled to receive. If the commission shall fail to bring suit to enjoin a violation or threatened violation of any provision of this act, or any rule, regulation, or order of the commission within ten (10) days after receipt of written request to do so by any person who is or will be adversely affected by such violation,

the person making such request may bring such suit in his own behalf to restrain such violation or threatened violation in any court in which the commission might have brought suit. The commission shall be made a party defendant in such suit in addition to the person violating or threatening to violate a provision of this act, or a rule, regulation, or order of the commission, and the action shall proceed and injunctive relief may be granted without bond in the same manner as if suit had been brought by the commission.

C. In case of failure or refusal on the part of any person to comply with the subpoena issued by the commission or in case of the refusal of any witness to testify as to any material matter regarding which he may be interrogated, any district court in the state, upon good cause shown by the application of the commission, may issue a warrant of attachment for such person and if after hearing the court finds his failure or refusal to be unjustified, compel him to comply with such subpoena, and to attend before the commission and produce any subpoenaed records, books, and documents for examination, and to give his testimony. Such court shall have the power to punish for contempt as in the case of disobedience to a like subpoena issued by the court, or for refusal to testify therein.

History: En. Sec. 10, Ch. 238, L. 1953.

60-134. Rehearing. Any person adversely affected by any rule, regulation, or order of the commission may within twenty (20) days after its effective date apply to the commission in writing for a rehearing. The application for rehearing shall be acted upon within ten (10) days after its filing, and if granted, the rehearing shall be held without undue delay.

History: En. Sec. 11, Ch. 238, L. 1953.

Court review of order of commission by suit for injunction trial de novo-temporary restraining order, when allowed, bond-appeals. Any interested person adversely affected by any provision of this act. or by any rule, regulation, or order made by the commission hereunder, or by any act done or threatened thereunder, may obtain court review and seek relief by a suit for an injunction against the commission as defendant, which suit may be instituted in the district court of the county where the commission keeps its principal office, or in the district court of any county wherein the land involved or any part thereof is situated. The term "interested person," as used herein, shall be interpreted broadly and liberally, especially where the suit involves the right to drill a well, or involves some other act which clearly affects the plaintiff even though the effect be indirect; and if the act complained of involves a general order for a pool, or the right to drill a well therein, a person who owns or has an interest in a well in such pool, which well is capable of producing oil or gas, shall be considered to be, prima facie, an interested person. Such suit shall be given a preferential setting, and shall be tried de novo and disposed of as an ordinary civil suit, and not upon the record of any hearing or hearings before the commission, if any be held. The statute, rule, regulation, or decision involved in such suit shall be prima-facie valid; however, the finding of fact, actual or presumed, made by the commission in support of the rule, regulation, order, or decision involved in such suit

shall not be binding on the court though supported by evidence introduced at a hearing or hearings before the commission. The court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any commission action. The court shall

- (a) compel commission action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside commission action, findings, and conclusions found to be
- (1) arbitrary, unreasonable, capricious, and abuse of discretion, or otherwise not in accordance with law;
 - (2) contrary to constitutional right, power, privilege, or immunity;
- (3) in excess of statutory jurisdiction, authority or limitations, or short of statutory right;
 - (4) without observance of procedure required by law; or
 - (5) unwarranted by the facts.

The court shall consider all the evidence, shall pass on the credibility of witnesses and the weight to be given their testimony, and shall resolve such fact issues as may be necessary for decision in the case.

- B. No temporary restraining order or temporary injunction of any kind shall be granted against the commission and its members or against the attorney general, or against any agent, employee, or representative of the commission, restraining the commission and its members, or any of its agents, employees, or representatives, or the attorney general, from enforcing any of the provisions of this act, or any rule, regulation, or order made thereunder until it shall be shown to the satisfaction of the court that the act done or threatened is probably without sanction of the law or that the provisions of this act, or the rule, regulation, or order complained of is probably invalid or unreasonable, and that, if enforced against the complaining party, will probably cause an irreparable injury. With respect to any order or decree granting temporary injunctive relief, the nature and extent of the probable invalidity of the statute, or of any provision of this act, or of a rule, regulation, or order thereunder involved in such suit, must be recited in the order or decree granting the temporary relief, as well as a clear statement of the probable damage relied upon by the court as justifying temporary injunctive relief.
- C. No temporary restraining order or temporary injunction of any kind against the commission or its members, or its agents, employees, or representatives, or the attorney general, shall become effective until the plaintiff shall execute a bond with sufficient sureties in such amount and upon such conditions as the court may direct. The bond shall be made payable to the state of Montana, shall be approved by the judge of the court, and shall be for the use and benefit of all persons who may be injured by the acts done under the protection of the temporary restraining order or temporary injunction. Any person claiming injury must bring suit within six (6) months after the date of the final determination of the validity, in whole or in part of the provisions of the act or the rule, regulation, or order, the enforcement of which was enjoined; otherwise the right to bring such suit shall be forever barred.

D. An appeal to the supreme court may be taken from any final judgment, decree or order in any such action, as provided in chapter 20 of Title 93, Revised Codes of Montana, 1947.

History: En. Sec. 12, Ch. 238, L. 1953.

Cross-Reference

Application of Montana Rules of Civil Procedure to this section, sec. 93-2711-7.

60-136. Enjoining violations of act. Whenever it appears that any person is violating or threatening to violate any provision of this act, or any rule, regulation, or order of the commission, the commission shall bring suit against such person in the district court of any county where the violation occurs or is threatened, to restrain such person from continuing such violation or from carrying out the threat of violation. In any such suit, the court shall have jurisdiction to grant to the commission, without bond or other undertaking, such prohibitory and mandatory injunctions as the facts may warrant, including temporary restraining orders.

History: En. Sec. 13, Ch. 238, L. 1953.

60-137. Rules and regulations of the board of railroad commissioners and of oil conservation board not in conflict with this act remain effective. All of the rules, regulations and orders of the board of railroad commissioners of the state of Montana and of the oil conservation board of the state of Montana in effect at the effective date of this act and not in conflict herewith, covering, pertaining to, or relating to any of the regulatory authority, matters and things embraced in this act shall be and remain in full force and effect as rules, regulations and orders of the commission until abrogated or amended by rules, regulations and orders duly promulgated by the commission.

History: En. Sec. 14. Ch. 238. L. 1953.

60-138. Commission substituted for board of railroad commissioners and oil conservation board in all agreements, contracts, proceedings, etc., pertaining to matters embraced in this act. The commission shall be and hereby is substituted for the board of railroad commissioners of the state of Montana and the oil conservation board of the state of Montana in all agreements, contracts, undertakings and proceedings covering or pertaining to the regulatory authority, matters and things embraced in this act, and shall be subject to the liabilities and entitled to the benefits thereof.

History: En. Sec. 15, Ch. 238, L. 1953.

60-139. Records of oil conservation board and board of railroad commissioners pertaining to matters embraced in this act become property of the commission—money in oil conservation board fund transferred—taxes, penalties, etc., saved from repealing clause. All property and records of the oil conservation board of the state of Montana and all records of the board of railroad commissioners pertaining to any regulatory authority, or matters, or things, embraced in this act shall forthwith, upon the effective date of this act, be and become the property and records of the commission. All money in the "oil conservation board fund" shall be transferred forthwith by the treasurer of the state of Montana to the oil and gas conservation fund upon the effective date of this act subject to

the payment of all lawful outstanding claims, demands and warrants of every nature existing. The commission is empowered to collect any and all taxes together with any penalty and interest which may be due and payable to the oil conservation board on the effective date of this act and the moneys so collected shall be credited to the oil and gas conservation fund, all of said taxes, penalties and interest and the right to collect the same being hereby saved from the repealing provision of this act.

History: En. Sec. 16, Ch. 238, L. 1953.

60-140. Lands subject to act. This act shall apply to all lands in the state of Montana lawfully subject to its taxation and police powers: provided, it shall apply to lands of the United States or to lands subject to the jurisdiction of the United States only to the extent that control and supervision of conservation of oil and gas by the United States on its lands shall fail to effect the intent and purposes of this act and otherwise shall apply to such lands to such extent as any officer of the United States having jurisdiction, or his duly authorized representative, shall approve any of the provisions of this act or the order or orders of the commission which affect such lands; and, furthermore, the same shall apply to any lands committed to a unit agreement approved by the secretary of the interior or his duly authorized representative except that the commission may, with respect to such unit agreements, suspend the application of this act or any part of this act so long as the conservation of oil and gas and the prevention of waste as in this act provided is accomplished under such unit agreements but such suspension shall not relieve any operator or owner from making such reports as may be required by the commission with respect to operations and production under any such unit agreement; nor shall such suspension relieve any operator or owner from the payment of taxes on his oil and gas production or payment for permit fees as required by this act.

History: En. Sec. 17, Ch. 238, L. 1953.

Law Review

Malone, "Oil and Gas Leases on Federal Lands," 14 Mont. L. Rev. 20 (Spring 1953).

60-141. Co-operation with other governmental units and agencies. The commission is authorized to co-operate with any other state, interstate, or federal agency, and other governmental agencies of the state of Montana to effect the objects and purposes of this act and expend such funds as may be reasonably necessary in connection therewith.

History: En. Sec. 18, Ch. 238, L. 1953.

Law Review

Hinkle, "Some Legal Aspects of the Unitization of Federal, State and Fee Lands," 14 Mont. L. Rev. 49 (Spring 1953).

60-142. Penalties. If any person shall willfully violate any lawful regulation or order of said commission, or if any person, for the purpose of evading this act, or any rule, regulation, or order of the commission, shall knowingly and willfully (1) make or cause to be made any false entry or statement in a report required by this act or by any such rule, regulation, or order, or any false entry in any record, account, or memorandum required by this act, or by any such rule, regulation, or order, or

(2) omit, or cause to be omitted, from any such record, account, or memorandum, full, true, and correct entries as required by this act, or by any such rule, regulation, or order, or (3) remove from this state or destroy, mutilate, alter, or falsify any such record, account, or memorandum, such person shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than five thousand dollars (\$5,000.00) or imprisonment in a county jail for a term not exceeding six (6) months, or to both such fine and imprisonment.

History: En. Sec. 19, Ch. 238, L. 1953.

60-143. Act does not constitute oil or gas wells as public utilities. Nothing in this act contained shall in any manner be construed as constituting or attempting to constitute oil or gas wells as a public utility or utilities.

History: En. Sec. 20, Ch. 238, L. 1953.

Owners shall make available to commission cores and cut-Any owner drilling a well for gas or oil shall make available to the commission at its field offices representative cores or chips, when available, and the cuttings from such well. Providing, however, that cores, chips or cuttings need not be so made available for a period of six (6) months following completion or abandonment of such wells. As pertains to the furnishing of cores, cuttings, or chips, the commission may, however, relieve the owner of any well of the obligation to furnish the same when in the opinion of the commission, the furnishing thereof would be unduly burdensome for such owner; provided, however, that such owner desiring relief must apply to and receive permission from the commission to not so furnish. The owner of any stratigraphic test well drilled for the purpose of obtaining lithologic information useful in potential oil and gas operations, as such well is defined by the commission's rules and regulations, shall within six (6) months from the date of the cessation of the drilling of such well, make available to the commission, complete sets of sample cuttings and representative cores or chips and well logs of such wells, which logs shall include among other information the size of casing used and the type and depth of water if any located, and such cuttings, cores, chips and logs shall be impounded and kept secure and confidential by the commission until such time that the commission shall desire to use the same; provided that the commission may not use such logs, chips, cores and cuttings from stratigraphic test wells until a period of three (3) years from the date of their impounding by the commission has elapsed unless the owner of such stratigraphic test well consents to their use by the commission prior to the expiration of the three (3) year period. The commission, during the period of impoundment for any cores, cuttings, chips, or logs from any stratigraphic test well, shall not give any person access to said cores, chips, cuttings or logs, and it shall not disclose any information relating thereto or derived therefrom. The commission shall require, and the owner of any stratigraphic test well shall furnish, prior to the commencement of drilling of such well, a good and sufficient surety bond, to be approved prior to the commencement of such drilling, conditioned upon the proper plugging of such well prior to abandonment, the amount of the said bond to be determined by the estimated depth as in the commission's rules and regulations provided for oil and gas wells, and, prior to abandonment, such wells shall be plugged by the owner thereof, or by the surety should the said owner be in default, such plugging to conform to the standards set down and determined by the commission. The provisions of this section shall not apply to core holes or tests less than one thousand (1,000) feet in depth drilled primarily for structural information.

History: En. Sec. 21, Ch. 238, L. 1953; amd. Sec. 1, Ch. 224, L. 1955; amd. Sec. 1, Ch. 234, L. 1959.

- 60-145. Privilege and license tax, quarterly statements, penalties—drilling permit fees—oil and gas conservation fund. A. For the purpose of providing funds for defraying the expenses of the operation and enforcement of this act, and expenses of said oil and gas conservation commission, the operators and producers of oil and gas shall be required to pay, and they will pay, an assessment not to exceed the amounts set forth in the following schedule on each and every barrel of crude petroleum originally produced, saved and marketed or stored within the state of Montana, or exported from the state of Montana, and on each and every ten thousand (10,000) cubic feet of natural gas produced, saved and marketed or stored within the state of Montana, or exported therefrom, to wit:
- (1) On leases on which wells are producing an average of twenty-five (25) barrels of crude petroleum per day, or less, an assessment not to exceed one-fourth of one cent $(\frac{1}{4}\phi)$ per barrel;
- (2) On leases on which wells are producing an average of more than twenty-five (25) barrels of crude petroleum per day, an assessment not to exceed one-half of one cent $(\frac{1}{2}\phi)$ per barrel;
- And, on wells producing, saving and marketing, storing, or exporting, natural gas, said operators and producers shall pay an assessment not to exceed one (1) mill per ten thousand (10,000) cubic feet of natural gas. Such payments shall be made during the time the oil and gas conservation commission is in existence. The commission shall by order, without prior notice and/or hearing, fix the amount of such assessments in the first instance and may, from time to time, without prior notice and/or hearing, reduce or increase the amount thereof as, in its judgment, the expenses chargeable against the oil and gas conservation fund may require; provided, however, that in no event shall the assessments fixed by the commission exceed the said limits hereinabove prescribed. The amounts of such assessments to be fixed by the commission in the first instance and from time to time as herein provided, shall be a percentage factor (not to exceed one hundred per cent) of the rates set forth in subparagraphs (1), (2) and (3) above, and the same percentage factor shall be used and applied by the commission in fixing the amount of the assessment on each barrel of crude production and each ten thousand (10,000) cubic feet of natural gas mentioned in said subparagraphs (1), (2) and (3) above. The producers of said crude petroleum and natural gas shall pay such assessments on each and every barrel of crude petroleum and each ten thousand (10,000) cubic feet of natural gas produced for themselves, as well as for others, including royalty hold-

ers, and said producers shall be reimbursed for such payments made on crude oil and natural gas produced for others in the same manner as they are reimbursed for net proceeds tax paid on crude petroleum or natural gas produced for others as provided for in section 84-6208.

For the purposes of this section, a "lease" shall mean that particularly described tract of land contained in a contract in writing, under seal, whereby a person having a legal estate in the land so described conveys a portion of his interest to another, in consideration of a certain rental or other recompense or consideration. Further, for the purposes of this section, leases owned or operated by one lessee which in whole or in part cover or affect an underground reservoir containing a common accumulation of crude petroleum oil or natural gas, or both, or which are encompassed within or affected by one particular unit agreement shall be considered as one lease relative to payments to be made under this section.

In addition to the above-mentioned privilege and license tax, any person, before commencing the drilling of any oil or gas well, shall secure from the commission a drilling permit and shall pay to the commission therefor the following amounts: for each well whose estimated depth is thirty-five hundred (3500) feet or less, twenty-five dollars (\$25.00); from thirty-five hundred and one (3501) feet to seven thousand (7,000) feet, seventy-five dollars (\$75.00); seven thousand (7,000) feet and deeper, one hundred fifty dollars (\$150.00).

- Each producer of crude petroleum in the state of Montana shall. not later than the last day of each of the calendar months of January, April. July and October, of each and every calendar year, render a true statement to the state treasurer of the state of Montana, and a duplicate thereof to the commission, duly signed and sworn to, of all crude petroleum produced by him in this state during the preceding three (3) calendar months, and containing such other information as the commission may require, and shall accompany such statement with the payment to the state treasurer of the assessment provided for in subsection A. of this section, above, for the period covered by such statement. Each producer of natural gas in the state of Montana shall render like statements to the state treasurer of all natural gas produced by him in this state, and shall make payment of the assessment provided for in said subsection A. of this section. above, at such times and for such periods as may be prescribed by regulation of the commission. Any producer carrying on business at more than one (1) place or location in this state may include all such places of business in one (1) statement.
- C. Any such assessment not paid within the time herein specified shall be delinquent, and a penalty of twenty-five per cent (25%) thereof shall be added thereto and the whole thereof shall bear interest at the rate of one per cent (1%) per month from the date of delinquency until paid. Upon request of the commission it shall be the duty of the attorney general to commence and prosecute to final determination in any court of competent jurisdiction an action at law to collect the same.
- D. All money collected under the provisions of this act shall be deposited in a special fund to be known as the "Oil and Gas Conservation Fund" by the state treasurer of the state of Montana, and the fund to be

raised shall be used for the purpose of paying all expenses of said commission and for no other purpose; all moneys from this fund shall be used by said commission subject to the approval of the controller and biennial appropriations by the legislative assembly. Upon the termination of said commission any balance remaining in said fund shall be paid over to the general fund of the state. All accounts and expenditures of said commission shall be certified by the commission, approved as provided by law, and paid by the state treasurer upon warrants drawn by the state auditor out of the oil and gas conservation fund.

E. The commission may appoint a secretary and employ such other persons as experts, assistants, clerks, and stenographers, as may be deemed necessary to perform the duties that may be required of it, and fix their compensation; provided, however, that the total expenditures of such commission shall not exceed in the aggregate during any fiscal year, the amount actually collected under the provisions of subsection A. of this section, above, plus any amount appropriated for that purpose, or otherwise accruing to said fund. The members of the commission shall be allowed their several expenses incurred in the discharge of their duties, as is elsewhere provided in this act.

History: En. Sec. 22, Ch. 238, L. 1953; Ch. 198, L. 1957; amd. Sec. 1, Ch. 47, L. amd. Sec. 1, Ch. 234, L. 1955; amd. Sec. 1, 1961.

- 60-146. [Petroleum field station of bureau of mines at Billings] Definitions. In this act the expression:
- (a) "Bureau" shall mean the bureau of mines and geology of the state of Montana school of mines;
- (b) "Commission" shall mean the oil and gas conservation commission of the state of Montana;
- (c) "Station" shall mean the petroleum field station located in the city of Billings, county of Yellowstone, state of Montana, including all real and personal property used in connection with the operation of said station, and buildings and structures upon such real property.

History: En. Sec. 1, Ch. 32, L. 1957.

60-147. Transfer of jurisdiction and record. On or before the effective date, as hereinafter provided, all jurisdiction, control, supervision, custody, property and records of the said station shall be and become transferred from the jurisdiction of the bureau to the commission, and the said commission shall, after the effective date hereinafter provided, assume the said jurisdiction, control, supervision and custody of all property, real and personal, and records located at or pertaining to the said station; that the property so transferred shall be and become the property of the commission; that the operation and maintenance of the said station shall be done and performed by the commission from and after the said effective date hereinafter provided, and the necessary expenditures therefor shall be paid from the oil and gas conservation commission fund, upon proper vouchers, by the state treasurer; that the said transfer of property, real, personal, or mixed, and the records from the bureau to the commission shall be made without lien, encumbrance, or obligation of any sort, upon

said property and records, and it is the express intention hereby to transfer said property and records to the commission free and clear.

History: En. Sec. 2, Ch. 32, L. 1957.

60-148. Availability of facilities to bureau. The commission is, by this act, authorized to make available to the authorized personnel or representatives of the bureau such facilities, equipment, records, and cores and cuttings, or samples of cores and cuttings, as are, or may be, required by the bureau in the furtherance of its oil and gas research and study.

History: En. Sec. 3, Ch. 32, L. 1957.

CHAPTER 2

PETROLEUM PRODUCTS-STANDARDS-REGULATION OF MANUFACTURE AND DISTRIBUTION

Petroleum products dealer's license. Section 60-201.

60-202. License fees.

60-203. Repealed. 60-203.1. "Commissioner" defined.

60-203.2. Enforcement of chapter—rules and regulations.

60-203.3. Standards for petroleum products.

60-204. Commissioner of agriculture to enforce act.

60-205. Sale of substandard products-adulteration and misrepresentation.

60-206 to 60-209. Repealed.

60-210. Commissioner authorized to employ laboratory for testing. 60-211. Inspections and tests by commissioner to insure compliance with act.

60-212. Notice to be posted concerning grade of products offered for salesamples for testing to be furnished.

60-213. Manufacture or sale of substandard distillates not prevented-labeling

required. 60-214. Registration of trade name of product-exclusive use of name by

registering party.

60-215. Misrepresentation of product unlawful—revocation of license.

60-216. "Misbranded" defined.

Samples of product may be taken by commission or user—inspection by commission—interference with inspections—inspectors—employ. 60-217. ment.

Repealed. 60-218.

60-219. Revocation of license for violations—hearing required.

Revocation of license of petroleum dealers for unreasonable or dis-60-220. criminatory prices—procedure.

60-221. Repealed.

60-222. Penalty for violations.

60-201. (3913.1) Petroleum products dealer's license. All persons, firms, copartnerships, corporations, trusts or agencies engaged, directly or indirectly, in the business of selling or offering or advertising for sale or in the business of refining or manufacturing or keeping for sale within the state of Montana any gasoline, kerosene, distillate, road oil, fuel oil, or any oil or gas or oil and gas product, lubricating oil and greases, shall make application to the state sealer of weights and measures of Montana, upon such blank forms as may be provided by said state sealer of weights and measures for the right to do business in the state of Montana and the making of such application shall be a condition precedent to the right of any such person, firm, copartnership, corporation, trust or agency to transact any such business within the state of Montana and upon the making and filing of such application and the payment of the proper fee, a license which shall be nontransferable shall issue to the applicant.

Such persons, firms, copartnerships, corporations, trusts or agencies are hereinafter, for brevity, designated dealers, and the term "dealers" whenever used herein, shall include all persons, firms, copartnerships, corporations, trusts or agencies described in this section.

History: En. Sec. 1, Ch. 109, L. 1927; amd. Sec. 2, Ch. 131, L. 1955; amd. Sec. 1, Ch. 96, L. 1957; amd. Sec. 1, Ch. 146, L. 1961.

Collateral References

Licenses 16(9).
53 C.J.S. Licenses § 30.
24 Am. Jur. 637, Gas and Oil, §§ 155 et

Validity of regulations as to keeping or storage of gasoline. 43 ALR 858 and 128 ALR 364.

Constitutionality and construction of gasoline inspection and tax statutes. 47 ALR 980; 84 ALR 839 and 111 ALR 185.

Validity of regulations as to manner of handling or distributing gasoline. 58 ALR 860.

Public regulation of gasoline filling stations. 96 ALR 1337.

60-202. (3913.2) License fees. That each retail dealer shall pay a license fee of two dollars (\$2.00) for each separate place of business which shall include one retail gasoline, diesel or fuel oil measuring device. Two dollars (\$2.00) for each additional gasoline, diesel or fuel oil measuring device in excess of one used at such place of business.

For vehicle tank meters and bulk petroleum meters of two and one-half $(2\frac{1}{2})$ inch and under, six dollars (\$6.00). All two and one-half $(2\frac{1}{2})$ inch and under meters for more than one fluid, ten dollars (\$10.00). Bulk petroleum meters over two and one-half $(2\frac{1}{2})$ inch, ten dollars (\$10.00). All meters over two and one-half $(2\frac{1}{2})$ inch for more than one fluid, fifteen dollars (\$15.00).

All vehicle tanks used for distribution of petroleum products without meters up to and including two hundred (200) gallons, eight dollars (\$8.00). All vehicle tanks without meters over two hundred (200) gallons and including three hundred (300) gallons, ten dollars (\$10.00). All vehicle tanks without meters over three hundred (300) gallons and including five hundred (500) gallons, twelve dollars (\$12.00). All vehicle tanks without meters over five hundred (500) gallons and including one thousand (1000) gallons, sixteen dollars (\$16.00). All vehicle tanks without meters over one thousand (1000) gallons and including two thousand (2000) gallons, twenty dollars (\$20.00). All liquefied petroleum gas meters, on vehicle tanks, ten dollars (\$10.00).

It is unlawful to make hose delivery from vehicle tanks unless the tanks have been calibrated by the division of weights and measures. Part of a compartment delivery can only be made by a certified meter or an approved can. Gauge stick measurement will not be permitted. All tank markers will require suitable provision for sealing in a definite position, approved by the division of weights and measures. The sealer of weights and measures shall by proper regulation, fix fees for retesting measuring devices and all tanks used for the distribution of petroleum products or any special service rendered.

All licenses shall be annual and expire December thirty-first.

All license fees, under this act, that are not paid before July first of each year, where measuring device is in use, there will be an added charge

of fifty per cent (50%) and if the fee is not paid the equipment will be sealed and removed, by the sealer of weights and measures or his deputies, from service until such fee has been paid. Anyone found using a device or removing the seal before all license fees have been paid shall, upon conviction, be deemed guilty of a misdemeanor and subject to a fine of not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100.00).

History: En. Sec. 2, Ch. 109, L. 1927; amd. Sec. 3, Ch. 131, L. 1955; amd. Sec. 2, Ch. 96, L. 1957; amd. Sec. 1, Ch. 220, L. 1961.

Collateral References Licenses 29. 53 C.J.S. Licenses § 48.

(3913.3) Repealed—Chapter 174, Laws of 1961.

Repeal

fund and payment of expenses, was repealed by Sec. 16, Ch. 174, Laws 1961. This section (Sec. 3, Ch. 109, L. 1927), relating to the state gasoline inspection

60-203.1. "Commissioner" defined. "Commissioner" means the Montana commissioner of agriculture for purposes of this act.

History: En. Sec. 1, Ch. 174, L. 1961.

60-203.2. Enforcement of chapter—rules and regulations. The provisions of this chapter shall be enforced by the commissioner of agriculture. He may promulgate necessary and reasonable rules and regulations for the interpretation of the provisions and intent of this chapter, and the same shall have the force and effect of law.

History: En. Sec. 2, Ch. 174, L. 1961.

Standards for petroleum products. The standards of quality, strength and purity for household gasoline, motor gasoline, kerosene, tractor fuel, diesel oil, heating oil, other domestic and industrial fuel oil and liquefied petroleum gases, including propane, propylene, normal butane or isobutane, and butylene shall be determined by the commissioner of agriculture and shall be based upon nationally recognized standards such as are published from time to time by the American Society for Testing Materials and the Natural Gasoline Association of America. When so determined by the commissioner and adopted and promulgated as regulations and orders of the commissioner such standards shall be the standards for such petroleum products sold in this state, and official tests of such petroleum products shall be based upon test standards so determined, adopted and promulgated.

History: En. Sec. 3, Ch. 174, L. 1961.

DECISIONS UNDER FORMER LAW

Operation and Effect

In a personal injury action it was proper to refuse to admit evidence of the flash point of fuel remaining in a storage tank following an explosion where the test fuel was not drawn from the tank until about three weeks after the accident, the tank was not in the exclusive control of anyone up to the date the sample was taken, and the sample was not tested for its flash point by the statutory method. Richardson v. Farmers Union Oil Co., 131 M 535, 312 P 2d 134, 141.

The only way to prove that a burner fuel would have a lower flash point than is required would be to prove a test by the statutory method. Richardson v. Farmers Union Oil Co., 131 M 535, 312 P 2d 134, 140.

60-204. (3913.4) Commissioner of agriculture to enforce act. The commissioner of agriculture is hereby required to secure the proper enforcement of this act, to procure for inspection and test and cause to be inspected and tested suitable samples of the commodities enumerated herein, to make all necessary rules and regulations not inconsistent with the terms of this act for the procuring and transmission of said samples and for reporting the results of analyses; to inform the county attorney of the proper county of all cases of violations of this law and to require said county attorney to assist in investigations under the provisions hereof and to ascertain the facts with respect thereto.

History: En. Sec. 4, Ch. 109, L. 1927; amd. Sec. 4, Ch. 174, L. 1961.

Collateral References
Inspection 3.
44 C.J.S. Inspection 4.

60-205. (3913.5) Sale of substandard products—adulteration and misrepresentation. It shall be unlawful to sell, offer or expose for sale any petroleum product for which standards or minimum specifications have been set by the commissioner of agriculture unless the said commodities shall, in all respects, meet the tests and standards prescribed, and no person shall sell, offer or expose for sale, any petroleum product which is adulterated, misbranded, or misrepresented with respect to the use for which it is reasonably intended.

History: En. Sec. 5, Ch. 109, L. 1927; amd. Sec. 5, Ch. 174, L. 1961.

Collateral References
Mines and Minerals \$\sim 93\frac{1}{2}\$.
58 C.J.S. Mines and Minerals \$ 239.

60-206 to 60-209. (3913.6 to 3913.9) Repealed—Chapter 174, Laws of 1961.

Repeal

These sections (Secs. 6, 7, 7a, 7b, Ch. 109, L. 1927; Sec. 1, Ch. 110, L. 1931; Sec. 1, Ch. 192, L. 1931; Sec. 1, Ch. 110, L. 1933; Sec. 1, Ch. 168, L. 1947), relating to

standards, grades, specifications and testing of gasoline, kerosene, tractor or motor fuels, and domestic and industrial fuel oil, were repealed by Sec. 16, Ch. 174, Laws 1961.

60-210. Commissioner authorized to employ laboratory for testing. That the commissioner is hereby authorized to employ a laboratory having sufficient facilities to make tests of petroleum products as required by this act, and to pay reasonable compensation for the analyses and tests made by such laboratory.

History: En. Sec. 1, Ch. 206, L. 1945; amd. Sec. 6, Ch. 174, L. 1961.

60-211. (3913.10) Inspections and tests by commissioner to insure compliance with act. The commissioner is hereby empowered to make and cause to be made, such inspections as may be necessary to secure compliance with this act and the safe handling and use of the commodities enumerated herein.

Specifically, such tests shall cover and be applicable to:

- (a) Any of the enumerated commodities manufactured or refined in this state and distributed to dealers in this state;
- (b) Any of the enumerated commodities shipped into this state from points outside thereof and resold or distributed to dealers for resale or distribution in this state;

(c) Any of the enumerated commodities exposed or offered for sale in this state.

Any gasoline, petroleum or distillate shipped into this state for the use by shipper or consignee in any place where the same is or may be dangerous to human life or public safety shall be subject to test and inspection by the commissioner as in this act provided.

History: En. Sec. 8, Ch. 109, L. 1927; amd. Sec. 7, Ch. 174, L. 1961.

60-212. (3913.14) Notice to be posted concerning grade of products offered for sale—samples for testing to be furnished. All dealers shall post in at least two conspicuous public places [in] each and every plant, filling station or distribution agency operated by and through them, a notice of [to] the public, on forms to be prescribed by the commissioner, advising the public in plain terms of the grade and character of commodities offered for sale or sold therein. If such dealers are engaged in selling more than one grade, quality or character of commodity under the description "high test" or "winter gasoline" or "high power gasoline," or "more mileage gasoline," or under any term indicating that the commodity has been specially treated to produce special results and secure particular effects, said notice shall plainly state the difference in the character, grade or quality of the commodity.

It is hereby made the duty of every dealer subject to the provisions of this act, to submit to the commissioner such quantity of the commodity to be tested as the commissioner shall require, accompanied by such data with respect thereto as the commissioner may prescribe.

History: En. Sec. 12, Ch. 109, L. 1927; amd. Sec. 8, Ch. 174, L. 1961.

Compiler's Note

The compiler has inserted the bracketed words "in" and "to" in the first paragraph.

60-213. (3913.15) Manufacture or sale of substandard distillates not prevented—labeling required. Nothing in this act contained shall prevent the manufacture or sale of engine distillates, power distillates, or kerosene distillates which do not conform to the standards of quality, purity and strength prescribed by the commissioner; provided, however, that the package or other container in or from which the same are sold, or offered for sale, shall be plainly labeled in a conspicuous manner easily visible to the purchaser in such a manner as to indicate the name and character thereof; or if the same be sold in bulk, then the shipping or other papers shall describe the character thereof, such description to be set forth in a conspicuous manner so as to give clear notice to the purchaser that the products sold do not conform to the standards of quality, purity and strength prescribed by the commissioner.

History: En. Sec. 13, Ch. 109, L. 1927; amd. Sec. 9, Ch. 174, L. 1961.

60-214. (3913.16) Registration of trade name of product—exclusive use of name by registering party. Any dealer within the provisions of this act or any other seller or distributor of the commodities named herein, selling or offering for sale under any trade name, designation or description any of the commodities named herein may make application to the

commissioner for registration of said trade name, designation, description or device, and if the same shall, in the judgment of the commissioner be a fair name, and not confusing to users and buyers of commodities named herein, and if the same shall not conflict with any previously registered name, said commissioner shall register such name and the same shall be the exclusive property of the dealer so registering the same, and any infringement thereof in public advertisement or competitive salesmanship shall constitute cause for revocation of the license of the infringer after due hearing as in this act provided.

History: En. Sec. 14, Ch. 109, L. 1927; amd. Sec. 10, Ch. 174, L. 1961.

87 C.J.S. Trade-Marks, Trade-Names, and Unfair Competition § 126 et seq.

Collateral References

Trade-Marks and Trade-Names and Unfair Competition \$\sim 43\$.

60-215. (3913.17) Misrepresentation of product unlawful—revocation of license. It shall be unlawful for any dealer under this act to misrepresent the quality, essential characteristics or brand of any of the enumerated commodities sold by him or to substitute without the knowledge and consent of the purchaser a different quality or brand of commodity than that ordered by such purchaser, and a violation of these requirements shall constitute cause for revocation of license.

History: En. Sec. 15, Ch. 109, L. 1927.

Collateral References
Licenses 38.
53 C.J.S. Licenses § 44.

60-216. (3913.18) "Misbranded" defined. For the purpose of this act, the term "misbranded" shall be construed as follows: All articles, the package or labels of which shall bear any statement, design, or device regarding the same, or regarding ingredients or substances therein, or regarding the properties of such articles, which are false or misleading in any particular whatsoever, shall be deemed misbranded.

History: En. Sec. 16, Ch. 109, L. 1927.

60-217. (3913.19) Samples of product may be taken by commission or user—inspection by commission—interference with inspections—inspectors—employment. For the purpose of obtaining information regarding suspected violation of this act, said commissioner [or any member thereof], or duly authorized representative shall have access to all places where the commodities enumerated herein are sold, offered for sale or kept for sale, manufactured, transported, or stored, and may take samples therefrom for analysis tendering payment therefor.

Any user or customer shall have the right, upon tendering payment therefor to receive from any dealer, a sample of any commodity sold for purpose of having analysis and test thereof made by the state chemist through the commissioner.

The commissioner, or any duly authorized representative thereof shall have the right to inspect any of the commodities enumerated herein, whether the same originate at points without the state or otherwise and whether the same are in transport or at rest in places where they are dangerous to human life or public safety.

Any person obstructing any entry or inspection authorized by this section, or failing upon request to assist therein shall be in violation of this act. The commissioner shall employ from time to time such inspectors as said commissioner shall deem necessary to carry out the provisions of this act, and said commissioner shall fix the compensation of such inspectors.

History: En. Sec. 17, Ch. 109, L. 1927; amd. Sec. 11, Ch. 174, L. 1961.

graph that appeared in the 1961 amendatory act but that appear to be surplusage.

Compiler's Note

The compiler has inserted brackets around certain words in the first para-

Collateral References

Inspection € 4, 5. 44 C.J.S. Inspection §§ 6, 9 et seq.

60-218. (3913.20) Repealed—Chapter 158, Laws of 1953.

Repeal

This section (Sec. 18, Ch. 109, L. 1927), relating to the power of the public service commission to inspect and classify meters, measuring and testing devices and apparatus used in connection with the wholesale

and retail distribution of petroleum and petroleum products, was repealed by Sec. 1, Ch. 158, Laws 1953. For present provisions covering the inspection and classifying of such devices and apparatus, see sec. 90-129.

60-219. (3913.21) Revocation of license for violations—hearing required. If the commissioner shall find that any dealer operating under this act has violated any of the provisions hereof, or of any lawful order or decision of the commissioner, promulgated pursuant to the provisions of this act, the commissioner shall, after due hearing thereon, noticed for not less than ten days, revoke, cancel, or suspend any license that it [he] has theretofore granted; and such revocation, cancellation or suspension, may be conditioned on such terms as to the commissioner may seem just and proper.

History: En. Sec. 19, Ch. 109, L. 1927; amd. Sec. 12, Ch. 174, L. 1961.

Collateral References Licenses \$38. 53 C.J.S. Licenses § 44.

Compiler's Note

The compiler has inserted the bracketed word "he."

(3913.22) Revocation of license of petroleum dealers for unreasonable or discriminatory prices—procedure. The commissioner is hereby vested with authority to revoke the license to engage in the business of selling gasoline and other petroleum products within the state of Montana. issued by such commissioner to any person, firm, partnership, association or corporation, where such person, firm, partnership, association or corporation is by such commissioner found guilty of charging an exorbitant or unreasonable price for gasoline sold within the state to residents of the state, or of discriminating between individuals or localities within the state in the prices charged for gasoline, or of discriminating between citizens of this state and citizens of adjoining states, to the disadvantage of the former, in the prices charged for gasoline. Anybody aggrieved by the action of such person, firm, partnership, association or corporation in so charging an exorbitant or unreasonable price for gasoline or in so discriminating between individuals or localities or in so discriminating between citizens of this state and citizens of adjoining states may file written charges with such commissioner against such person, firm, partnership,

association or corporation, and thereupon the commissioner shall issue a citation to such person, firm, partnership, association or corporation to show cause before the commissioner within twenty days thereafter why his, their or its license should not be revoked. Such person, firm, partnership, association or corporation may appear by counsel at the hearing and contest the charge. If the charge be established by a preponderance of the evidence the commissioner shall make an order revoking the license, otherwise the charge shall be dismissed. Within thirty days after the order of revocation is made such person, firm, partnership, association or corporation may appeal therefrom to the district court of the county in which the hearing was had. The appeal must be tried in the district court upon the record made before the commissioner, but it shall not of itself result in staying the orders of revocation. Nothing provided in this act is intended to interfere with or regulate commerce between states, the legislature in passing the same being actuated solely by a desire to protect the citizens of Montana against imposition.

History: En. Sec. 1, Ch. 147, L. 1935; amd. Sec. 13, Ch. 174, L. 1961.

60-221. (3913.23) Repealed—Chapter 174, Laws of 1961.

Repeal containing a separability clause, was re-This section (Sec. 2, Ch. 147, L. 1935), pealed by Sec. 16, Ch. 174, Laws 1961.

60-222. (3913.24) Penalty for violations. If any person, firm, copartnership or corporation coming within the provisions of this act shall violate any of the provisions of this act or shall do any act herein prohibited, or shall fail or refuse to perform any duty enjoined upon it, or violates or fails to comply with any rule or regulation issued pursuant to this act, for every such violation, failure or refusal such person, firm, copartnership or corporation, shall, in addition to the forfeiture of license as hereinbefore provided, be for the first offense punished by a fine of not less than ten dollars (\$10.00) and not to exceed one thousand dollars (\$1,000.00), and shall be punished for any subsequent offense by a fine of not less than fifty dollars (\$50.00) nor more than five thousand dollars (\$5,000.00), or by imprisonment in the county jail for a term not exceeding one year, or by both such fine and imprisonment.

History: En. Sec. 20, Ch. 109, L. 1927; amd. Sec. 14, Ch. 174, L. 1961.

Collateral References
Mines and Minerals \$241.
58 C.J.S. Mines and Minerals \$241.

Cross-Reference

Carrying on business without license, penalty, sec. 94-1511.

CHAPTER 3

STATE MANUFACTURE AND SALE OF PETROLEUM PRODUCTS
DECLARED PUBLIC PURPOSE

Section 60-301. Buying and selling of petroleum products, operating oil refineries declared public purpose.

60-302. Purchasing agent may be authorized to buy and sell gasoline and petroleum products, when—use of equipment.

60-303. Sales to be for cash.

60-304. Accounts to be kept by purchasing agent—semiannual reports.

60-305. Disposal of proceeds.
60-306. State subject to license taxes.

(4192.1) Buying and selling of petroleum products, operating oil refineries declared public purpose. The state of Montana in the exercise of its sovereign and police powers declares that engaging on its part in the business of buying crude oil and of buying and selling gasoline, oils and lubricants, and of constructing, purchasing or leasing and operating oil refineries, is a public purpose and is necessary for the good order, peace, safety, convenience and welfare of its people.

History: En. Sec. 1, Ch. 189, L. 1933.

Collateral References

Mines and Minerals \$2861/6. 58 C.J.S. Mines and Minerals § 243.

60-302. (4192.2) Purchasing agent may be authorized to buy and sell gasoline and petroleum products, when—use of equipment. The state purchasing agent is hereby granted authority, when so directed by the governor, attorney general and state treasurer, or a majority of them, to buy gasoline, oils and lubricants and to sell the same at wholesale and retain within the state, and to construct, purchase or lease and operate a refinery or refineries for the purpose of refining crude oil, including crude oil owned by the state and that purchased by him from others, and of manufacturing and selling gasoline, oils and lubricants, provided, however, that the authority herein granted, or any thereof, shall not be exercised except when the retail prices exacted by other dealers are found by such officers, or a majority of them, to be unreasonable and excessive. All tanks and other storage facilities, and all lands, platforms and unloading equipment now or hereafter owned or leased by the state, and not used exclusively for other purposes, may be used in conducting such business.

History: En. Sec. 2, Ch. 189, L. 1933.

(4192.3) Sales to be for cash. All sales of gasoline, oils and lubricants made under the authority herein granted shall be for cash only and at no time shall such sales be made at a loss to the state.

History: En. Sec. 3, Ch. 189, L. 1933.

(4192.4) Accounts to be kept by purchasing agent—semiannual reports. The state purchasing agent shall keep an accurate account of the quantities of crude oil, gasoline, oils and lubricants so purchased by him and the amounts paid therefor, and of all sales of gasoline, oils and lubricants, whether purchased or manufactured, made at any established station or otherwise, and the receipts therefrom, and the cost of erecting, buying or leasing such refinery or refineries, together with all expenses incident to the business, and he shall semiannually make a detailed report of all things connected with such business to the governor, attorney general and state treasurer.

History: En. Sec. 4, Ch. 189, L. 1933.

60-305. (4192.5) Disposal of proceeds. Moneys received from sales of products named herein shall be deposited with the state treasurer in a

special fund known as a gasoline marketing fund and disbursements therefrom requisitioned from the state purchasing agent to be approved by the state board of examiners and the state auditor should draw therefrom.

History: En. Sec. 5, Ch. 189, L. 1933.

60-306. (4192.6) State subject to license taxes. If the state of Montana shall enter the business contemplated by this act, it shall be subject to and shall pay all license taxes imposed by state or federal law, upon persons and corporations engaged in like business in this state.

History: En. Sec. 8, Ch. 189, L. 1933.

Collateral References
Licenses©=16(9).
53 C.J.S. Licenses § 30.

CHAPTER 4

DISCRIMINATION IN PRICE OF PETROLEUM PRODUCTS PROHIBITED

Section 60-401. Discrimination in price of petroleum products, penalty for—defenses—vendor to prove justification of price.

60-402. "Standard petroleum product" defined.

60-403. Purpose of act—construction.

60-404. Investigation of complaints—revocation of license for violations, 60-405. County attorney to prosecute reported violations or explain failure.

60-406. Penalty for violations.

60-407. Liability of violators for civil and exemplary damages.

60-401. (4193.1) Discrimination in price of petroleum products, penalty for—defenses—vendor to prove justification of price. Any person, firm, company, association, or corporation, either domestic or foreign, doing business in the state of Montana, and engaged in the selling of any standard petroleum product, that shall demand or collect from any person or customer a higher price for any standard petroleum product in one part of the state of Montana than the price being demanded or collected at substantially the same time by such person, firm, company, association or corporation, from other persons or customers in another part of the state of Montana or in the nearest adjoining state for a like article of standard petroleum product shall be guilty of discrimination which is hereby declared to be a fraud, and the agents or officers of such person, firm, company, association, or corporation participating, guilty of a misdemeanor, provided, however, in the trial of an action under the provisions of this act, in the determination of the justification of the price demanded or collected by a person, firm, company, association, or corporation, charged with a violation of the provisions of this act, transportation, quantity of sales, emergencies, cost of doing business, or similar differences under the respective conditions may be offered as a matter of defense or justification for the differences in price demanded or collected. When competent evidence is offered, in the trial of any action under this act, of a demand for or the receipt of a higher price for any standard petroleum product in the state of Montana by any person, firm, company, association or corporation, than such person, firm, company, association or corporation demanded, collected or received at substantially the same time for the same or a similar article of standard petroleum product in another part of the state

of Montana or in the nearest adjoining state, the burden of proof shall then be upon such person, firm, company, association or corporation, or agents or officers, on trial to prove that the difference in the price demanded or collected was justified.

History: En. Sec. 1, Ch. 111, L. 1935.

Collateral References and Unfair Competition 36 Am. Jur. 510, M

Trade-Marks and Trade-Names and Unfair Competition \$\infty\$68(2).

87 C.J.S. Trade-Marks, Trade-Names, and Unfair Competition § 240 et seq. 36 Am. Jur. 510, Monopolies, Combinations, and Restraints of Trade, § 28.

60-402. (4193.2) "Standard petroleum product" defined. The term "Standard Petroleum Product" as used herein refers to and includes gasoline, fuel oil, distillates, greases and lubricating oils.

History: En. Sec. 2, Ch. 111, L. 1935.

60-403. (4193.3) Purpose of act—construction. This act is intended to compel persons, firms, companies, associations and corporations, doing business in the state of Montana, and engaged in the selling of and dealing in standard petroleum products, to treat all customers in one part of the state of Montana on an equal with all customers in other parts of the state of Montana or in the nearest adjoining state, and to promote the uniform application of the law of the state of Montana providing a tax on all gasoline used by motor vehicles when traveling over the public highways, and this act shall be liberally construed to accomplish those purposes.

History: En. Sec. 3, Ch. 111, L. 1935.

(4193.4) Investigation of complaints—revocation of license for 60-404. violations. If complaint shall be made to the attorney general that any person, firm, company, association or corporation is guilty of discrimination as defined by this act, he shall forthwith investigate such complaint, and for that purpose he shall subpoena witnesses, administer oaths, take testimony, and require the production of books or other documents, and if, in his opinion, sufficient grounds exist therefor, he shall prosecute an action in the name of the state in the proper court to annul the charter or revoke the permit or license of such person, firm, company, association or corporation as the case may be, and to permanently enjoin such person, firm, company, association or corporation from doing business in this state, and if, in such action, the court shall find that such person, firm, company, association or corporation is guilty of discrimination as defined by this act, such court shall annul the charter or revoke the permit or license of such person, firm, company, association or corporation, and may permanently enjoin it or them from transacting business in this state.

History: En. Sec. 4, Ch. 111, L. 1935.

Collateral References

Licenses 38; Trade-Marks and Trade-Names and Unfair Competition 97.

53 C.J.S. Licenses § 44; 87 C.J.S. Trade-Marks, Trade-Names, and Unfair Competition § 245.

60-405. (4193.5) County attorney to prosecute reported violations or explain failure. If any person shall present to the county attorney of any county in the state of Montana, in which county such discriminatory acts of any person, firm, company, association, or corporation shall have been committed, a sworn written statement of the price paid, the date and the

parties selling and buying, and reasonably reliable information of the price demanded or collected by such person, firm, company, association or corporation, for a corresponding or similar article of standard petroleum product sold or offered for sale in another part of the state of Montana or in the nearest adjoining state by such person, firm, company, association or corporation, then it shall be the duty of such county attorney to promptly investigate and either commence and prosecute an action or furnish the informant with a written statement of his reasons for not commencing and prosecuting an action under this act.

History: En. Sec. 4-A, Ch. 111, L. 1935.

27 C.J.S. District and Prosecuting Attorneys § 15(1).

Collateral References

District and Prosecuting Attorneys 9.

60-406. (4193.6) **Penalty for violations.** Any person, firm, company, association or corporation violating any of the provisions of this act shall be guilty of a misdemeanor and shall be punishable by a fine of not exceeding five hundred dollars (\$500.00).

History: En. Sec. 5, Ch. 111, L. 1935.

Collateral References Licenses \$241. 53 C.J.S. Licenses \$63.

60-407. (4193.7) Liability of violators for civil and exemplary damages. In addition to the penalty above prescribed, any customer of such person, firm, company, association or corporation may bring a civil action in any county in which such offending person, firm, company, association or corporation may be doing business, and recover therein not only actual damages for violation of this act, but also exemplary damages for such reasonable sum as the jury may deem proper punishment for the unlawful practice of discrimination as herein defined.

History: En. Sec. 6, Ch. 111, L. 1935.

 $87\,$ C.J.S. Trade-Marks, Trade-Names, and Unfair Competition $\S~258$ et seq.

Trade-Marks and Trade-Names and Unfair Competition 598.

Collateral References

CHAPTER 5

OWNERS OF ROYALTY INTERESTS MAY COMPEL ACCOUNTING FOR ROYALTY

Section 60-501. Action for accounting for royalty from oil, gas or other minerals—judgment, what included.
60-502. Remedy not exclusive.

60-501. Action for accounting for royalty from oil, gas or other minerals—judgment, what included. (1) Whenever an owner of a royalty interest in or attaching to lands producing natural gas, oil or other minerals or in or to the natural gas, oil or other mineral production from said lands, whether said royalty is payable in kind out of the product of the lands or out of the money proceeds from the sale of the product of said lands, shall make a written demand upon the person or persons obligated to deliver or pay such royalty for an accounting of the natural gas, oil or other minerals produced from said lands and makes written demand for delivery or pay-

ment of such owner's royalty as may then be due and the person or persons obligated for the delivery or payment of said royalty fails to make the accounting demanded and the payment or delivery of the royalty due within a period of sixty (60) days following the date upon which said demand is made, then the said owner of said royalty may file an action in the district court of the county wherein said lands are located to compel the accounting demanded and to recover the payment or delivery of the royalty due against the said person or persons obligated as aforesaid.

- (2) In said action the successful party or parties recovering judgment against the person or persons obligated shall, in addition to relief by way of accounting and recovery of the royalty due as hereinabove provided, also recover judgment for a sum of money by way of reasonable attorney's fees to be allowed by the court together with the costs allowed to successful parties by law in actions generally in said court.
- (3) Whenever the same person or persons is or are obligated for delivery or payment of said royalty to separate owners of royalty in or to a tract of land or any portion of said land or the product of the whole or any part of said land, then any number of said owners of royalty may join their separate causes of action as parties plaintiff in the action herein provided for and in their complaint filed in said action each cause of action of each of the several plaintiffs shall be set forth separately in said complaint and the judgment given, made and rendered upon said complaint, shall adjudge the relief to one or more of the plaintiffs and deny relief to any one or more of said plaintiffs accordingly as the evidence may establish.
- (4) If the defendant or defendants prevail in said action against any one or more of said plaintiffs, the court shall adjudge and allow to such defendant or defendants and against the unsuccessful plaintiff or plaintiffs recovery of a sum of money as reasonable attorney's fees to be allowed by the court and adjudge and allow costs to said defendant to be recovered from the said unsuccessful plaintiff or plaintiffs in said action, as provided for by law in actions generally in said court.

History: En. Sec. 1, Ch. 78, L. 1943.

Collateral References

Rights and remedies of owner or lessee of oil or gas land or mineral or royalty interest therein, in respect of waste of oil or gas through operations on other lands. 4 ALR 2d 198.

What constitutes oil or gas "royalty" within language of conveyance or assign-

ment. 4 ALR 2d 492.

Rights of tenants for years and remaindermen inter se in royalties or rents under oil or gas lease. 18 ALR 2d 98.

Construction and effect of provision in mineral lease excusing payment of minimum rent or royalty. 28 ALR 2d 1013. Expenses and taxes deductible by lessee

Expenses and taxes deductible by lessee in computing lessor's oil and gas royalty or other return. 73 ALR 2d 1056.

60-502. Remedy not exclusive. The remedy herein provided for is in the nature of a special remedy additional to and not a substitute for other remedies given by law to owners of royalties in lands of the character specified, and all acts or parts of acts in conflict with the provisions of this act shall not apply in actions authorized and provided for by this act.

History: En. Sec. 2. Ch. 78, L. 1943.

Collateral References

Rights and remedies of owner or lessee of oil or gas land or mineral or royalty

interest therein, in respect of waste of oil or gas through operations on other lands. 4 ALR 2d 198.

CHAPTER 6

INTERSTATE COMPACT FOR CONSERVATION OF OIL AND GAS AUTHORIZED

Section 60-601. Governor authorized to join interstate compact for conservation of oil and gas.

60-602. Form of compact.

60-603. Governor may extend expiration date of compact.

60-604. Governor to be member of "Interstate Oil Compact Commission."

60-605. Limitation on power of state representative.

60-606. Expenses of representative.

60-601. Governor authorized to join interstate compact for conservation of oil and gas. The governor of the state of Montana is hereby authorized and directed, for and in the name of the state of Montana, to join with other states in the interstate compact to conserve oil and gas, which was heretofore executed in the city of Dallas, Texas, on the 16th day of February, 1935, and is now deposited with the department of state of the United States, and which has been extended with the consent of Congress to September 1, 1947.

History: En. Sec. 1, Ch. 121, L. 1945.

Compiler's Note

time by the various states with the approval of Congress. The latest extension is to September 1, 1963.

The interstate compact to conserve oil and gas has been extended from time to

60-602. Form of compact. The interstate compact to conserve oil and gas referred to in the above section, and which it is hereby proposed to enter and to extend by agreement reads as follows:

"AN INTERSTATE COMPACT TO CONSERVE OIL AND GAS"

ARTICLE I

"This agreement may become effective within any compacting state at any time as prescribed by that state, and shall become effective within those states ratifying it whenever any three of the states of Texas, Oklahoma, California, Kansas, and New Mexico have ratified and Congress has given its consent. Any oil-producing state may become a party hereto as hereinafter provided.

ARTICLE II

"The purpose of this compact is to conserve oil and gas by the prevention of physical waste thereof from any cause.

ARTICLE III

"Each state bound hereby agrees that within a reasonable time it will enact laws, or if laws have been enacted, then it agrees to continue the same in force, to accomplish within reasonable limits the prevention of:

- (a) The operation of any oil well with an inefficient gas-oil ratio.
- (b) The drowning with water of any stratum capable of producing oil or gas, or both oil and gas in paying quantities.
- (c) The avoidable escape into the open air or the wasteful burning of gas from a natural gas well.

- (d) The creation of unnecessary fire hazards.
- (e) The drilling, equipping, locating, spacing or operating of a well or wells so as to bring about physical waste of oil or gas or loss in the ultimate recovery thereof.
- (f) The inefficient, excessive or improper use of the reservoir energy in producing any well.

"The enumeration of the foregoing subjects shall not limit the scope of the authority of any state.

ARTICLE IV

"Each state bound hereby agrees that it will, within a reasonable time, enact statutes, or if such statutes have been enacted then that it will continue the same in force, providing in effect that oil produced in violation of its valid oil and/or gas conservation statutes or any valid rule, order or regulation promulgated thereunder, shall be denied access to commerce; and providing for stringent penalties for the waste of either oil or gas.

ARTICLE V

"It is not the purpose of this compact to authorize the states joining herein to limit the production of oil or gas for the purpose of stabilizing or fixing the price thereof, or create or perpetuate monopoly, or to promote regimentation, but is limited to the purpose of conserving oil and gas and preventing the avoidable waste thereof within reasonable limitations.

ARTICLE VI

"Each state joining herein shall appoint one representative to a commission hereby constituted and designated as THE INTERSTATE OIL COMPACT COMMISSION, the duty of which said commission shall be to make inquiry and ascertain from time to time such methods, practices, circumstances and conditions as may be disclosed for bringing about conservation and the prevention of physical waste of oil and gas, and at such intervals as said commission deems beneficial it shall report its findings and recommendations to the several states for adoption or rejection.

"The commission shall have the power to recommend the co-ordination of the exercise of the police powers of the several states within their several jurisdictions to promote the maximum ultimate recovery from the petroleum reserves of said states, and to recommend measures for the maximum ultimate recovery of oil and gas. Said commission shall organize and adopt suitable rules and regulations for the conduct of its business.

"No action shall be taken by the commission except:

- (1) By the affirmative votes of the majority of the whole number of the compacting states, represented at any meeting, and
- (2) By a concurring vote of a majority in interest of the compacting states at said meeting, such interest to be determined as follows:

Such vote of each state shall be in the decimal proportion fixed by the ratio of its daily average production during the preceding calendar half-year to the daily average production of the compacting states during said period.

ARTICLE VII

"No state by joining herein shall become financially obligated to any other state, nor shall the breach of the terms hereof by any state subject such state to financial responsibility to the other states joining herein.

ARTICLE VIII

"This compact shall expire September 1, 1947. But any state joining herein may, upon sixty (60) days' notice, withdraw herefrom.

"The representatives of the signatory states have signed this agreement in a single original which shall be deposited in the archives of the department of state of the United States, and a duly certified copy shall be forwarded to the governor of each of the signatory states.

"This compact shall become effective when ratified and approved as provided in ARTICLE I. Any oil-producing state may become a party hereto by affixing its signature to a counterpart to be similarly deposited, certified and ratified.

"Done in the city of Dallas, Texas, this sixteenth day of February, 1935."

(ORIGINALLY SIGNED BY THE REPRESENTATIVES OF THE FOLLOWING STATES:

Oklahoma, Texas, New Mexico, Colorado, Illinois, Michigan, California, Arkansas and Kansas.)

History: En. Sec. 2, Ch. 121, L. 1945.

Compiler's Notes

The original interstate compact to conserve oil and gas, which was to expire September 1, 1937, has been extended from time to time by the various states with the approval of Congress. It had been extended to 1947 at the time Montana rati-

fied the compact. The latest extension is to September 1, 1963.

Additional states which have ratified the compact are Alabama, Florida, Indiana, Kentucky, Louisiana, Mississippi, New York, Ohio, Pennsylvania, Tennessee and West Virginia.

60-603. Governor may extend expiration date of compact. nor of Montana is further authorized and empowered, for and in the name of the state of Montana, to execute agreements for the further extension of the expiration date of the said interstate oil compact to conserve oil and gas, and to determine if and when it shall be for the best interest of the state of Montana to withdraw from said compact upon sixty days' notice as provided by its terms. In the event he shall determine that the state should withdraw from said compact he shall have full power and authority to give necessary notice and to take any and all steps necessary and proper to effect the withdrawal of the state of Montana from said compact.

History: En. Sec. 3, Ch. 121, L. 1945.

60-604. Governor to be member of "Interstate Oil Compact Commission." The governor shall be the official representative of the state of Montana on "The Interstate Oil Compact Commission," provided for in the interstate compact to conserve oil and gas, and shall exercise and perform for the state of Montana all the powers and duties as a member of "The Interstate Oil Compact Commission"; provided that he shall have the authority to appoint an assistant representative who shall act in his stead

as the official representative of the state of Montana as a member of said commission. Said assistant representative shall take the oath of office prescribed by the constitution of the state of Montana, which shall be filed with the secretary of state.

History: En. Sec. 4, Ch. 121, L. 1945.

60-605. Limitation on power of state representative. Nothing in this act shall be construed as granting any power to the representative of the state of Montana in his private or official capacity, or to the interstate oil compact commission, to prorate, allocate, regulate or control oil or gas production or refined products thereof within the state of Montana or the markets therefor; and shall not have the effect or be construed as in any manner surrendering to the federal government any rights over or in the production, sale or transportation of oil or gas or the refined products thereof in the state of Montana; nor shall anything in this act be understood or construed to bind or obligate the state of Montana to enact any new legislation or to amend or alter any laws heretofore enacted and now in force pertaining to the oil and gas industries in Montana.

History: En. Sec. 5, Ch. 121, L. 1945.

60-606. Expenses of representative. The representative, or the assistant representative appointed by the governor of the state of Montana, to the oil compact commission shall be allowed and paid his reasonable expenses while engaged in the performance of his official duties and said expenses and all other expense incurred in connection with the said interstate oil compact and said commission shall be paid out of the oil conservation board fund in accordance with the provisions of 60-121.

History: En. Sec. 6, Ch. 121, L. 1945. tion was repealed by Sec. 24, Ch. 238, Laws 1953, effective April 1, 1953.

Section 60-121 referred to in this sec-

CHAPTER 7

LEASE OF LAND OF LOCAL GOVERNMENTAL UNITS FOR DEVELOPMENT OF OIL AND GAS

Section 60-701. Lease-terms-land not subject to leasing.

60-702. Pooling of acreage.

60-703. Prevention of interference with normal use of land when land is being used for specific purpose.
60-704. Tax deed lands of county—leases of reserved or excepted interest—

60-704. Tax deed lands of county—leases of reserved or excepted interest—validating existing leases.

60-701. Lease—terms—land not subject to leasing. The governing body of any county, city, town, school district or incorporated political subdivision within the state of Montana, may, if deemed for the best interests of the county, city, town, school district, or incorporated political subdivision, lease any real property owned by the county, city, town, school district or incorporated political subdivision for oil and gas development purposes. Such leases shall be made upon the best terms obtainable; shall provide for such terms, except as hereinafter provided, as the governing body shall deem to be for the best interests of the county, city, town, school

district or incorporated political subdivision; shall reserve a royalty of not less than twelve and one-half per cent $(12\frac{1}{2}\%)$ which shall include any royalty payable to any person other than the lessor; and shall be for periods not exceeding ten (10) years and so long thereafter as oil, gas or other hydrocarbons shall be produced from the premises embraced in the lease; provided, however, that nothing contained herein shall authorize the leasing of lands acquired by a county by tax deed except under the provisions of section 84-4194, which section is hereby declared in full force and effect.

History: En. Sec. 1, Ch. 131, L. 1953.

60-702. Pooling of acreage. When deemed in the best interests of the county, city, town, school district or incorporated political subdivision, the governing body may enter into agreements for the pooling of acreage with others for unit operations for the production of oil or gas, or both, and for the apportionment of oil or gas royalties, or both, on an acreage or other equitable basis, and may modify existing leases and leases hereafter entered into with respect to delay rentals, delay drilling penalties and royalties in accordance with such pooling agreements, and such unit plans of operation; provided, however, that such agreements shall not change the percentages of royalties to be paid to the county, city, town, school district or incorporated political subdivision from the percentages as fixed in its leases.

History: En. Sec. 2, Ch. 131, L. 1953. Lands," 14 Mont. L. Rev. 49 (Spring 1953).

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Hinkle, "Some Legal Aspects of the Unitization of Federal, State and Fee

60-703. Prevention of interference with normal use of land when land is being used for specific purpose. In the event such real property is held or used for a specific purpose, any lease made under the provisions of this act shall contain such protective provisions as may be necessary to prevent any interference by the lessee with the normal use of such real property for such purpose by the county, city, town, school district or incorporated political subdivision.

History: En. Sec. 3, Ch. 131, L. 1953.

60-704. Tax deed lands of county—leases of reserved or excepted interest—validating existing leases. When in any deed or contract for sale a county has reserved or excepted an interest in oil and gas in and under any land acquired by tax deed, the board of county commissioners may lease such interest for oil and gas development purposes upon the same terms and conditions as are provided for the leasing of lands which have been acquired by tax deed, offered for sale and not sold, or may ratify, confirm and adopt any then existing mineral or oil and gas lease in so far as it describes such land. All such leases, ratifications, confirmations and adoptions heretofore executed by the board of county commissioners are declared to be valid and are ratified, approved and confirmed.

History: En. Sec. 1, Ch. 155, L. 1957.

CHAPTER 8

UNDERGROUND GAS STORAGE RESERVOIRS

Section 60-801. Definitions.

60-802. Underground storage.

60-803. Eminent domain—use and limitations. 60-804. Certificate of commission—publication.

60-805. Proceedings.

60-801. Definitions. As used in this act (a) "underground reservoir" shall mean any subsurface sand, stratum or formation of the earth suitable for the injection and storage of natural gas therein and the withdrawal of natural gas therefrom; (b) "natural gas" shall mean gas either while in its original state or after the same has been processed by removal therefrom of component parts not essential to its use for light and fuel; (c) "native gas" shall mean gas which has not been previously withdrawn from the earth; (d) "natural gas public utility" shall mean any person, firm or corporation authorized to do business in this state and engaged in the business of transporting or distributing natural gas by means of pipelines into, within or through this state for ultimate public use; (e) "commission" shall mean the oil and gas conservation commission of the state of Montana; (f) "underground storage" shall mean the process of injecting and storing of natural gas within and withdrawing of natural gas from an underground reservoir.

History: En. Sec. 1, Ch. 259, L. 1955.

60-802. Underground storage. The underground storage of natural gas which promotes conservation thereof, which permits the building of reserves for orderly withdrawal in periods of peak demand, which makes more readily available natural gas to the domestic, commercial and industrial consumers of this state, or which provides a better year-round market to the various gas fields, serves the public interest and welfare of this state.

Therefore, in the manner hereinafter provided the commission and the court may find and determine that the underground storage of natural gas as hereinbefore defined is in the public interest.

History: En. Sec. 2, Ch. 259, L. 1955.

- 60-803. Eminent domain—use and limitations. Any natural gas public utility may acquire through the exercise of the right of eminent domain as hereinafter provided for its use for the underground storage of natural gas any underground reservoir which the commission shall have found to be suitable and in the public interest for the underground storage of natural gas, and in connection therewith may acquire such other interests in property as may be required adequately to maintain and operate such underground reservoir facilities; provided, however, that the acquisition by the exercise of the right of eminent domain of underground reservoirs granted hereby, shall be limited as follows:
- (a) No sand, formation, or stratum which is producing or has produced, or which is capable of producing oil, shall be subject to appropriation hereunder.

- No gas bearing sand, formation, or stratum shall be subject to appropriation hereunder, unless the recoverable volumes of native gas therein have all been produced or unless such sand, formation or stratum has a greater value or utility as an underground reservoir for the purpose of insuring an adequate supply of natural gas for domestic, commercial, or industrial consumers of natural gas, or for the conservation of natural gas, than for the production of the remaining relatively small volumes of native gas as compared with the original volumes of natural gas therein, provided that no gas, sand, formation or stratum shall be acquired under the terms of this act when the gas in the underground reservoir is being used for the secondary recovery of oil unless gas in necessary and required amounts is furnished to the operator or operators of the secondary recovery operations for as long as oil is produced in paying quantities in the secondary operations for the recovery of oil at the same cost as the cost to it or them at the time of acquisition of the gas being used in such secondary operations, not exceeding, however, the quantity of the appropriated gas that remained recoverable from such sand, formation or stratum at the time of its acquisition, if such operator was or such operators were at such time entitled to the whole thereof, or if it was or they were at such time entitled to less than the whole thereof, then not to exceed the quantity thereof to which such operator was or operators were then entitled.
- (c) Only such area of such underground sand, formation or stratum as may reasonably be expected to be penetrated by gas displaced or injected into such underground gas storage reservoir may be appropriated hereunder.
- (d) No rights or interests in existing underground gas reservoirs, being used for the injection, storage or withdrawal of natural gas, owned or operated by a natural gas public utility as defined in this act other than the natural gas public utility seeking to acquire the same, shall be subject to appropriation hereunder.

The exercise of the right of eminent domain hereby granted shall be without prejudice to the rights of the owner of said lands or of other rights or interests therein to drill or bore into or through the underground reservoir so appropriated in such manner as shall comply with orders, rules and regulations of the commission issued for the purpose of protecting underground reservoir against pollution and against the escape of natural gas therefrom and shall be without prejudice to the rights of the owner of said lands or other rights or interests therein as to all other uses thereof. The additional cost of complying with such regulations or orders in order to protect the storage reservoir shall be paid by the natural gas public utility.

History: En. Sec. 3, Ch. 259, L. 1955.

60-804. Certificate of commission—publication. Any natural gas public utility desiring to exercise the right of eminent domain as to any property for use for underground storage of natural gas shall, as a condition precedent to the filing of its complaint in the district court, apply for and obtain from the commission a certificate setting out findings of said com-

mission (a) that the underground sand, stratum or formation sought to be acquired is suitable for an underground reservoir for the storage of natural gas and that its use for such purposes is in the public interest; (b) the amount of native gas, if any, remaining therein and the portion thereof recoverable; (c) and that the applicant has in good faith sought to acquire the rights sought hereunder; provided, that the commission shall issue no such certificate until after public hearing is had on the application, pursuant to notice given to all persons known to have an interest in the property proposed to be acquired in the manner provided by the laws of the state of Montana for service of process in a civil action as set forth in Chapter 30, Title 93, Revised Codes of Montana of 1947, as amended, and the executive secretary of the commission shall for such purposes be vested with the same powers and charged with the same duties as the clerk of the district court has under said chapter.

History: En. Sec. 4, Ch. 259, L. 1955.

60-805. Proceedings. Any natural gas public utility having first obtained a certificate from the commission as hereinbefore provided, desiring to exercise the right of eminent domain for the purpose of acquiring property for the underground storage of natural gas shall do so in the manner hereinafter provided. Such natural gas public utility shall present to the district court of the county wherein the land is situated, or to the judge thereof a complaint setting forth the purpose for which the said property is sought to be acquired, a description of the property sought to be appropriated and the names of the owners thereof as shown by the records of such county. The plaintiff shall file the certificate of the commission as a part of its complaint and no order by the court granting said complaint shall be entered without such certificate being filed therewith, and subsequent proceedings shall follow the procedure provided by law in the exercise of the rights of eminent domain, sections 93-9901, et seq.

History: En. Sec. 5, Ch. 259, L. 1955.

TITLE 61

PARENT AND CHILD

Chapter 1. Parent and child-children by birth and by adoption, 61-101 to 61-140.

2. Adoption, 61-201 to 61-218.

CHAPTER 1

PARENT AND CHILD-CHILDREN BY BIRTH AND BY ADOPTION

Section 61-101. Legitimacy of children born in wedlock.

61-102. Legitimacy of children after dissolution of marriage.

61-103. Who may dispute the legitimacy of a child.

61-104. Obligations of parents for the support and education of their children.

61-105. Custody of legitimate child.

61-106. Custody of children where husband and wife living separate.

61-107. When husband or wife may bring action for the exclusive control of children—decree in such cases.

61-108. Custody of illegitimate child.

61-109. Allowance to parent.

61-110. Parent cannot control the property of child.

61-111. Remedy for parental abuse.

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61-114. Reciprocal duties of parents and children in maintaining each other.

61-115. When a parent is liable for necessaries supplied to a child. 61-116. When a parent is not liable for support furnished his child.

61-117. Husband not bound for the support of his wife's children by a former marriage.

61-118. Compensation and support of adult child.

61-119. Parent may relinquish services and custody of child.

61-120. Wages of minors.

61-121. Right of parent to determine the residence of child.

61-122. Custody may be awarded without divorce proceedings when parents separated.

61-123. Child legitimatized by marriage of parents.

61-124. Duty of child to support indigent parents.

61-125. Penalty for failure to support.

61-126. Civil action to enforce duty to support.

61-127 to 61-138. Repealed. 61-139. Adoption of adult.

61-140. Procedure applicable.

61-101. (5830) Legitimacy of children born in wedlock. All children born in wedlock are presumed to be legitimate.

History: En. Sec. 280, Civ. C. 1895; re-en. Sec. 3738, Rev. C. 1907; re-en. Sec. 5830, R. C. M. 1921. Cal. Civ. C. Sec. 193. Field Civ. C. Sec. 86.

Sufficiency of Evidence to Rebut Presumption

A child born in wedlock is presumed to be legitimate even though it was conceived before the marriage of the mother; such presumption cannot be overcome by circumstances which only create doubt or suspicion, but to overcome it the evidence must be strong, distinct and wholly satisfactory. In re Thompson, 77 M 466, 251 P 163.

The disputable presumption that a child born in lawful wedlock is legitimate (sec. 93-1301-7, and this section) is successfully "controverted by other evidence" when the preponderance of the evidence is contrary thereto. (Mr. Justice Angst-

man dissenting.) In re Wray's Estate, 93 M 525, 536, 19 P 2d 1051.

Collateral References

Bastards 3. 10 C.J.S. Bastards § 3.

Blood grouping test as affected by presumption of legitimacy. 46 ALR 2d 1032, 1035.

Who may dispute presumption of legitimacy of a child conceived or born during wedlock. 53 ALR 2d 572.

Presumption of legitimacy, or of paternity, of a child conceived or born before marriage. 57 ALR 2d 729.

61-102. (5831) Legitimacy of children after dissolution of marriage. All children of a woman who has been married, born within ten months after the dissolution of her marriage, are presumed to be legitimate children of that marriage.

History: En. Sec. 281, Civ. C. 1895; 5831, R. C. M. 1921. Cal. Civ. C. Sec. 194. re-en. Sec. 3739, Rev. C. 1907; re-en. Sec. Based on Field Civ. C. Sec. 87.

61-103. (5832) Who may dispute the legitimacy of a child. The presumption of legitimacy can be disputed only by the husband or wife, or the descendant of one or both of them. Illegitimacy, in such case, may be proved like any other fact.

History: En. Sec. 282, Civ. C. 1895; re-en. Sec. 3740, Rev. C. 1907; re-en. Sec. 5832, R. C. M. 1921. Cal. Civ. C. Sec. 195. Field Civ. C. Sec. 88.

Competent Witnesses

Under this section, the husband and wife, as well as the descendant of one or both, are competent to testify in opposition to the disputable presumption as to the legitimacy of a child, the section thus abrogating the common-law rule precluding husband or wife from testifying as to nonaccess of the husband in determining the question of legitimacy. In re Wray's Estate, 93 M 525, 536, 19 P 2d 1051.

References

In re Thompson, 77 M 466, 474, 251 P

Collateral References

Bastards \$\infty 7. 10 C.J.S. Bastards § 16.

Who may dispute presumption of legitimacy of a child conceived or born during wedlock. 53 ALR 2d 572.

61-104. (5833) Obligations of parents for the support and education of their children. The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability.

History: En. Sec. 283, Civ. C. 1895; re-en. Sec. 3741, Rev. C. 1907; re-en. Sec. 5833, R. C. M. 1921, Cal. Civ. C. Sec. 196. Field Civ. C. Sec. 89.

Cross-References

Consent of parent to marriage, sec. 48-118.

Delinquent children, secs. 10-601 to 10-633.

Desertion of children, sec. 94-304.
Disposing of child for mendicant purposes, penalty, sec. 94-305.

Guardian and ward, secs. 91-4501 to 91-4526.

Injuries to minor, father or mother may sue, sec. 93-2809.

Seduction of daughter, right of parent to sue, sec. 93-2808.

Agreement between Husband and Wife

While an agreement between husband and wife touching the custody and maintenance of the children will be enforced, it cannot, as against the children, divest either parent of the duty to support and educate them. Brice v. Brice, 50 M 388, 394, 147 P 164, explained in 102 M 121, 128, 56 P 2d 750 and 109 M 418, 426, 96 P 2d 918.

Duty of Divorced Father, although Custody in Mother

The fact that the burden of education and support of the children is cast upon a divorced wife, to whom their custody has been awarded, does not divest the father of the duty to meet his obligation when the mother can no longer support the burden assumed by her. Brice v. Brice, 50 M 388, 394, 147 P 164, explained in 102 M 121, 128, 56 P 2d 750 and 109 M 418, 426, 96 P 2d 918.

Where mother has custody of child

Where mother has custody of child under divorce decree but cannot alone carry the burden of its education and maintenance, the burden must, at least in part, be borne by the father, and this extends to expense of college education for child. Refer v. Refer, 102 M 121, 127, 56 P 2d 750.

Enforcement of Support Order

A court which severs the marriage ties by granting a valid decree of divorce possesses the necessary power to compel the ex-husband to support his minor children. State ex rel. Lay v. District Court, 122 M 61, 198 P 2d 761, 767.

Manslaughter

Omission to perform an act required by law can be the basis for manslaughter. Hence, where evidence disclosed that child, age of 5 months, died due to starvation, that his weight at death was only 5 pounds 14 ounces, which was but 10 ounces over weight at birth, and that the father and mother had the means with which to care for the child, evidence would be sufficient to support conviction of manslaughter. State v. Bischert, 131 M 152, 308 P 2d 969.

In a homicide prosecution of a mother for the alleged willful omission to provide sufficient food and care for her three month old daughter, the state's own evidence showing that defendant did feed the infant, was seen holding and loving the child and did have the child to a doctor, and this evidence negated willfulness and malice, there could not be a finding of second degree murder. State v. Rivers, 133 M 129, 320 P 2d 1004, 1006.

The omission to perform an act required by law can be the basis for man-

slaughter. State v. Rivers, 133 M 129, 320 P 2d 1004, 1006.

Surviving Parent, Right to Custody

While the welfare of a child in the matter of its custody is of paramount interest, neither such interest nor the child's wish will justify a court in denying its custody to the surviving parent, in the absence of a showing of unfitness or inability to support the child, and turning it over to a stranger. August v. Burns, 79 M 198, 220, 255 P 737.

References

Melville v. Butte-Balaklava Copper Co., 47 M 1, 5, 130 P 441; State ex rel. Tong v. District Court, 109 M 418, 426, 96 P 2d 918; Tabor v. Industrial Accident Fund, 126 M 240, 247 P 2d 472, 475 (dissenting opinion).

Collateral References

Parent and Child ≈3. 67 C.J.S. Parent and Child § 14. 39 Am. Jur. 592, Parent and Child, §§ 6 et seq.

Parent's obligation to support adult child, 1 ALR 2d 910.

Support provisions of judicial decree or order as limit of father's liability for expenses of child. 7 ALR 2d 491.

Right of child or parents to recover

Right of child or parents to recover for alienation of other's affections and right of child to recover for criminal conversation with parent causing parent to neglect family duties. 12 ALR 2d 1178. Maintenance of suit by child, inde-

Maintenance of suit by child, independently of statute, against parent for support. 13 ALR 2d 1142.

Death of parent as affecting decree for support of child. 18 ALR 2d 1126.

Father's criminal liability for desertion of or failure to support child where divorce decree awards custody to another. 73 ALR 2d 960.

61-105. (5834) Custody of legitimate child. The father and mother of a legitimate unmarried minor child are equally entitled to its custody, services, and earnings. If either parent be dead, or unable, or refuse to take the custody, or has abandoned his or her family, the other is entitled to its custody, services, and earnings.

History: En. Sec. 284, Civ. C. 1895; re-en. Sec. 3742, Rev. C. 1907; amd. Sec. 1, Ch. 61, L. 1915; re-en. Sec. 5834, R. C. M. 1921. Cal. Civ. C. Sec. 197. Based on Field Civ. C. Sec. 90.

Cross-Reference

Apprentices, secs. 10-301 to 10-310.

Child's Earnings

While a parent is entitled to the earnings of a minor resulting from the obliga-

tion of support, the privilege may be waived either expressly or by conduct, such as making no objection to the employment, or where the parent testifies in support of the claim presented by the minor and assigned to and sued upon by another; by so doing the parent estops himself from thereafter claiming the minor's earnings. Schwab v. Peterson, 80 M 214, 221, 260 P 711.

Habeas Corpus to Gain Custody

Under this section, the father and mother of a legitimate unmarried child are equally entitled to its custody, and where a father deeming the mother unfit to have charge of a child, had placed it in the care of his sister and her husband, the latter were his agents empowered to resist attempts of the mother to regain its custody by habeas corpus and the court could properly permit an investigation into facts which would have been available to the father if attempt had been made to take the child from him. In re Thompson, 77 M 466, 475, 251 P 163, distinguished in 88 M 282, 286, 292 P 582.

There are two kind of writs of habeas corpus involving an infant: one directed toward freeing the child from imprisonment, and the other to exercise the powers of a court of general equity jurisdiction over the custody of the person of the infant; in the latter class the unsuccessful claimant has the right of appeal to the supreme court. Ex parte Reinhardt, 88 M

282, 288, 292 P 582.

When decree of divorce was rendered in Utah and custody of children was granted to mother she then had the preference right. She waived this right when she offered to give up their custody and father took them to his home in Montana, and she could not deprive father of custody by habeas corpus proceedings in Montana unless he was an unfit person to have the custody, or unless it was shown that the best welfare of the children required that they be taken from him. State ex rel. Lessley v. District Court, 132 M 357, 318 P 2d 571, 574.

Order of Preference as to Custody

As between the parent and grandparent, the law prefers the former as the custodian of an infant child, unless the parent is incompetent or unfit because of poverty or depravity to provide the physical comforts and moral training essential to

the life and well-being of the child. Ex parte Bourquin, 88 M 118, 122, 290 P 250.

In considering the welfare of a child, where a mother has two infant children, the custody of one of which she seeks to regain by habeas corpus, the advantage flowing from the companionship of the two, important in the development of character and an unselfish disposition, should not be overlooked. Ex parte Bourquin, 88 M 118, 122, 290 P 250.

Presumption in Favor of Parent, Rebuttable

Where custody is in dispute, the presumption that the best interests of child require that it be awarded to the parent, is a rebuttable one; each case must be decided upon its own peculiar facts and circumstances. Haynes v. Fillner, 106 M 59, 71, 75 P 2d 802.

Review on Appeal

The decision of a district judge in a controversy affecting rights to the custody of a child of tender years ought not to be disturbed on appeal except upon a clear showing of an abuse of judicial discretion. Ex parte Bourquin, 88 M 118, 122, 290 P 250.

References

Brice v. Brice, 50 M 388, 394, 147 P 164; August v. Burns, 79 M 198, 220, 255 P 737; In re Metcalt's Estate, 93 M 542, 546, 19 P 2d 905; State ex rel. Tong v. District Court, 109 M 418, 426, 96 P 2d 918; Application of Enke, 129 M 353, 287 P 2d 19, 23, cert. den. 350 U S 923, 100 L Ed 808, 76 S Ct 212.

Collateral References

Minority of parents as affecting right to guardianship or custody of person or estate of child. 19 ALR 1043.

Jurisdiction of courts over custody of child denied medical care by its parent or custodian. 30 ALR 2d 1138.

61-106. (5835) Custody of children where husband and wife living separate. The husband and father, as such, has no rights superior to those of the wife and mother, in regard to the care, custody, education, and control of the children of the marriage, while such husband and wife live separate and apart from each other.

History: En. Sec. 285, Civ. C. 1895; re-en. Sec. 3743, Rev. C. 1907; re-en. Sec. 5835, R. C. M. 1921. Cal. Civ. C. Sec. 198.

References

Application of Enke, 129 M 353, 287 P

2d 19, 23, cert. den. 350 U S 923, 100 L Ed 808, 76 S Ct 212.

Collateral References

Parent and Child 2, 3, 5.
67 C.J.S. Parent and Child §§ 11, 14, 29.

61-107. (5836) When husband or wife may bring action for the exclusive control of children—decree in such cases. Without application for

divorce, the husband or wife may bring an action for the exclusive control of the children of the marriage, and the court or judge may, during the pendency of such action, or at the final hearing thereof, or afterwards, make such order or decree in regard to the support, care, custody, education, and control of the children of the marriage, as may be just, and in accordance with the natural rights of the parents and the best interests of the children, and may at any time thereafter amend, vary, or modify such order or decree, as the natural rights and the interests of the parties, including the children, may require.

History: En. Sec. 286, Civ. C. 1895; re-en. Sec. 3744, Rev. C. 1907; re-en. Sec. 5836, R. C. M. 1921. Cal. Civ. C. Sec. 199.

Collateral References

Parent and Child 2(4). 67 C.J.S. Parent and Child § 13.

61-108. (5837) Custody of illegitimate child. The mother of an illegitimate unmarried minor is entitled to its custody, services, and earnings.

History: En. Sec. 287, Civ. C. 1895; re-en. Sec. 3745, Rev. C. 1907; re-en. Sec. 5837, R. C. M. 1921. Cal. Civ. C. Sec. 200. Field Civ. C. Sec. 91.

Cross-Reference

Rights of inheritance, secs. 91-404, 91-405.

Forfeiture of Right to Custody

A mother may forfeit her right to the custody and control of her child by her treatment or abandonment of it or by failing to support it. State ex rel. Veach v. Veach, 122 M 47, 195 P 2d 697, 700.

Habeas Corpus

The right to custody of the minor child is not absolute and in habeas corpus

proceedings the paramount and controlling question by which the court must be guided is the welfare of the child. State ex rel. Veach v. Veach, 122 M 47, 195 P 2d 697, 700.

References

In re Thompson, 77 M 466, 474, 251 P 163.

Collateral References

Bastards 15; Parent and Child 5.
10 C.J.S. Bastards § 17; 67 C.J.S. Parent and Child § 28.

Right of putative father to custody of illegitimate child, 37 ALR 2d 884.

61-109. (5838) Allowance to parent. The proper court may direct an allowance to be made to the parent of a child, out of its property, for its past or future support and education, on such conditions as may be proper, whenever such direction is for its benefit.

History: En. Sec. 288, Civ. C. 1895; re-en. Sec. 3746, Rev. C. 1907; re-en. Sec. 5838, R. C. M. 1921. Cal. Civ. C. Sec. 201. Field Civ. C. Sec. 92.

Collateral References

Parent and Child € 3(2). 67 C.J.S. Parent and Child § 21.

61-110. (5839) **Parent cannot control the property of child.** The parent, as such, has no control over the property of the child.

History: En. Sec. 289, Civ. C. 1895; re-en. Sec. 3747, Rev. C. 1907; re-en. Sec. 5839, R. C. M. 1921. Cal. Civ. C. Sec. 202. Field Civ. C. Sec. 93.

Child's Action for Personal Injuries Property Right—Unaffected by Parents' Neglect of Notice

The neglect of the parents of an injured child to give the 60-day notice to a city provided for by Ch. 122, Laws 1937 (11-1305), may not be imputed to the child, and since under section 64-105, a child is incapable of appointing an agent for any

purpose, it is questionable whether the statute can be complied with in that respect by anyone as agent. A child's cause of action for damages for personal injuries is a property right over which, under this section, a parent has no control. Lazich v. Belanger, 111 M 48, 52, 105 P 2d 738.

References

Davis v. Industrial Accident Board, 92 M 503, 510, 15 P 2d 919.

Collateral References

Parent and Child >8. 67 C.J.S. Parent and Child § 56. **61-111.** (5840) **Remedy for parental abuse.** The abuse of parental authority is the subject of judicial cognizance in a civil action brought by the child, or by its relative within the third degree, or by the county commissioners of the county where the child resides; and when the abuse is established the child may be freed from the dominion of the parent, and the duty of support and education enforced.

History: En. Sec. 290, Civ. C. 1895; re-en. Sec. 3748, Rev. C. 1907; re-en. Sec. 5840, R. C. M. 1921. Cal. Civ. C. Sec. 203. Based on Field Civ. C. Sec. 94.

Unfitness of Mother to Have Custody

It is only by one of the methods provided by statute that parents may be deprived of their right to the custody of their children (this section and sec. 61-112), hence where a sheriff without writ, warrant or order of court took a seventeen-year-old girl, whose father and

brother were charged with felonies committed upon her person, into custody, his return to a writ of habeas corpus sued out by the mother, alleging inter alia unfitness of the mother to have her in custody, was no defense to the writ. Ex parte Reinhardt, 88 M 282, 288, 292 P 582, distinguished in 106 M 59, 76, 75 P 2d 802.

Collateral References

Parent and Child 3(3), 11, 16, 17. 67 C.J.S. Parent and Child §§ 20, 61, 86, 91.

- **61-112.** (5841) When parental authority ceases. The authority of the parent ceases:
- 1. Upon the appointment, by a court, of a guardian of the person of a child;
 - 2. Upon the marriage of a child; or,
 - 3. Upon its attaining majority.

History: En. Sec. 291, Civ. C. 1895; re-en. Sec. 3749, Rev. C. 1907; re-en. Sec. 5841, R. C. M. 1921. Cal. Civ. C. Sec. 204. Field Civ. C. Sec. 95.

Marriage of Female Minor

In the absence of a statute to that effect, the marriage of a female minor, while releasing her from parental authority, does not change her status to that of an adult, and therefore under the juvenile delinquent law, a married female under the age of eighteen may properly be committed to the State Vocational School for Girls until she attains the age of twenty-one years. State ex rel. Foot v. District Court, 77 M 290, 292, 250 P 973, 49 ALR 398.

References

Ex parte Reinhardt, 88 M 282, 288, 292 P 582; Haynes v. Fillner, 106 M 59, 77, 75 P 2d 802; State ex rel. Houtchens v. District Court, 122 M 76, 199 P 2d 272, 279.

Collateral References

Parent and Child 50. 16. 67 C.J.S. Parent and Child 80. 86. 39 Am. Jur. 702, Parent and Child, 880. 64.67.

Inclusion or exclusion of day of birth in determining attainment of majority. 5 ALR 2d 1147.

Power of public authorities to transfer custody of child to guardian for medical care over objection of parent or custodian. 30 ALR 2d 1138.

61-112.1. Destruction of property by person under 18—liability of parents for. Any municipal corporation, county, city, town, school district or department of the state of Montana, or any person, or any religious organization whether incorporated or unincorporated, shall be entitled to recover damages in a civil action in an amount not to exceed three hundred dollars (\$300.00) in a court of competent jurisdiction from the parents of any person under the age of eighteen (18) years, living with the parents, who shall maliciously or willfully destroy property, real, personal, or mixed, belonging to such municipal corporation, county, city, town, school district or department of the state of Montana, or person or religious organization.

History: En. Sec. 1, Ch. 195, L. 1957.

Collateral References

Parent purchasing motor vehicle for, or giving it to, minor or incompetent child as rendering donor liable for child's acts. 36 ALR 2d 735.

Tort liability of child of tender years. 67 ALR 2d 570.

Liability of person permitting child to have gun, or leaving gun accessible to child, for injury inflicted by the latter. 68 ALR 2d 782.

61-112.2. Limitation on amount of recovery. The recovery shall be limited to the actual damages in an amount not to exceed three hundred dollars (\$300.00) in addition to taxable court costs.

History: En. Sec. 2, Ch. 195, L. 1957.

61-113. (5842) Remedy when a parent dies without providing for the support of his child. If a parent chargeable with the support of a child dies, leaving it chargeable to the county, and leaving an estate sufficient for its support, the county commissioners of the county may claim provision for its support from the parent's estate by civil action, and for this purpose may have the same remedies as any creditors against that estate, and against the heirs, devisees, and the next of kin of the parent.

History: En. Sec. 292, Civ. C. 1895; re-en. Sec. 3750, Rev. C. 1907; re-en. Sec. 5842, R. C. M. 1921. Cal. Civ. C. Sec. 205. Based on Field Civ. C. Sec. 96.

Collateral References

Parent and Child € 3(3). 67 C.J.S. Parent and Child § 20.

Death of parent as affecting decree for support of child. 18 ALR 2d 1126.

61-114. (5843) Reciprocal duties of parents and children in maintaining each other. It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessaries previously furnished to such parent is binding.

History: En. Sec. 293, Civ. C. 1895; re-en. Sec. 3751, Rev. C. 1907; re-en. Sec. 5843, R. C. M. 1921. Cal. Civ. C. Sec. 206. Field Civ. C. Sec. 97.

Operation and Effect

In an action for the death of his minor son, the plaintiff can recover for pecuniary benefits reasonably to be expected to be received from the deceased after his majority, in view of sections 93-2809 and 93-2810. Gilman v. The G. W. Dart Hardware Co., 42 M 96, 98, 111 P 550.

Requirement May Be Consideration for Conveyance—To What Extent

While an existing legal obligation of a child to support her indigent mother, under this section, may be a good consideration under section 13-502, as between the child and her grantor, it is not such a consideration as would make the child

an innocent purchaser for value so as to defeat the title of a grantee whose conveyance was first recorded, under section 73-202. Kelly v. Grainey, 113 M 520, 534, 129 P 2d 619.

References

Hollingsworth v. Davis-Daly Estates Copper Co., 38 M 143, 163, 99 P 142.

Collateral References

Parent and Child 3, 4.
67 C.J.S. Parent and Child §§ 15, 23.
39 Am. Jur. 710, Parent and Child, §§ 69,
70.

Right of child or parents to recover for alienation of other's affections and right of child to recover for criminal conversation with parent causing parent to neglect family duties. 12 ALR 2d 1178.

61-115. (5844) When a parent is liable for necessaries supplied to a child. If a parent neglects to provide articles necessary for his child under his charge, according to his circumstances, a third person may in good faith

supply such necessaries, and recover the reasonable value thereof from the parent.

History: En. Sec. 294, Civ. C. 1895; re-en. Sec. 3752, Rev. C. 1907; re-en. Sec. 5844, R. C. M. 1921. Cal. Civ. C. Sec. 207. Field Civ. C. Sec. 98.

References

Barbour v. Barbour, 134 M 317, 330 P 2d 1093, 1098.

Collateral References

Parent and Child ← 3.
67 C.J.S. Parent and Child § 15.
39 Am. Jur. 686, Parent and Child, § 52-54.

61-116. (5845) When a parent is not liable for support furnished his child. A parent is not bound to compensate the other parent, or a relative, for the voluntary support of his child, without an agreement for compensation, nor to compensate a stranger for the support of a child who has abandoned the parent without just cause.

History: En. Sec. 295, Civ. C. 1895; 5845, R. C. M. 1921. Cal. Civ. C. Sec. 208. re-en. Sec. 3753, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 99.

61-117. (5846) Husband not bound for the support of his wife's children by a former marriage. A husband is not bound to support his wife's children by a former husband; but if he receives them into his family and supports them, it is presumed that he does so as a parent, and, where such is the case, they are not liable to him for their support, nor he to them for their services.

History: En Sec. 296, Civ. C. 1895; re-en. Sec. 3754, Rev. C. 1907; re-en. Sec. 5846, R. C. M. 1921. Cal. Civ. C. Sec. 209. Field Civ. C. Sec. 100.

Separate Maintenance

In an action for separate maintenance the court cannot, under this section, make provision for the children of plaintiff by a former marriage. Decker v. Decker, 56 M 338, 185 P 168.

References

State ex rel, Sheedy v. District Court, 66 M 427, 431, 432, 213 P 802; Goodwin v. Elm Orlu Min. Co., 83 M 152, 269 P 403.

Collateral References

Parent and Child \$14. 67 C.J.S. Parent and Child \$80. 39 Am. Jur. 699, Parent and Child, §62.

61-118. (5847) **Compensation and support of adult child.** Where a child, after attaining majority, continues to serve and to be supported by the parent, neither party is entitled to compensation, in the absence of an agreement therefor.

History: En. Sec. 297, Civ. C. 1895; re-en. Sec. 3755, Rev. C. 1907; re-en. Sec. 5847, R. C. M. 1921. Cal. Civ. C. Sec. 210. Field Civ. C. Sec. 101.

Gratuitous Services

The law regards personal services rendered by near relatives or members of the same family living together as one household in the conduct of the home, and board or lodging or other necessaries or comforts furnished, as gratuitous, and in the absence of an express agreement to

pay for the same, or facts and circumstances from which such an agreement can be inferred, there can be no recovery therefor. San Antonio v. Spencer, 82 M 9, 264 P 944.

Collateral References

Parent and Child 3, 5, 16. 67 C.J.S. Parent and Child §§ 14, 28, 86.

Parent's obligation to support adult child. 1 ALR 2d 910.

61-119. (5848) Parent may relinquish services and custody of child. The parent whether solvent or insolvent, may relinquish to the child the

right of controlling him and receiving his earnings. Abandonment by the parent is presumptive evidence of such relinquishment.

History: En. Sec. 298, Civ. C. 1895; re-en. Sec. 3756, Rev. C. 1907; re-en. Sec. 5848, R. C. M. 1921. Cal. Civ. C. Sec. 211. Field Civ. C. Sec. 102.

Cross-Reference

Apprentices, secs. 10-301 to 10-310.

Earnings of Minor

While a parent is entitled to the earnings of a minor resulting from the obligation of support, the privilege may be waived either expressly or by conduct,

such as making no objection to the employment, or where the parent testifies in support of the claim presented by the minor and assigned to and sued upon by another; by so doing the parent estops himself from thereafter claiming the minor's earnings. Schwab v. Peterson, 80 M 214, 221, 260 P 711.

Collateral References

Parent and Child € 16. 67 C.J.S. Parent and Child § 86.

61-120. (5849) Wages of minors. The wages of a minor employed in service may be paid him until the parent or guardian entitled thereto gives the employer notice that he claims such wages.

History: En. Sec. 299, Civ. C. 1895; re-en. Sec. 3757, Rev. C. 1907; re-en. Sec. 5849, R. C. M. 1921. Cal. Civ. C. Sec. 212. Based on Field Civ. C. Sec. 103.

References

Schwab v. Peterson, 80 M 214, 221, 260 P 711.

Collateral References

Parent and Child 5(2).
67 C.J.S. Parent and Child \$29.
39 Am. Jur. 624, Parent and Child,
§§ 31, 32.

61-121. (5850) Right of parent to determine the residence of child. A parent entitled to the custody of a child has a right to change his residence, subject to the power of the proper court to restrain a removal which would prejudice the rights or welfare of the child.

History: En. Sec. 300, Civ. C. 1895; re-en. Sec. 3758, Rev. C. 1907; re-en. Sec. 5850, R. C. M. 1921. Cal. Civ. C. Sec. 213. Field Civ. C. Sec. 104.

Change in Residence of Minor Child

Under this section a parent entitled to the custody of a child has the right to change its residence; hence a divorced wife to whom the custody of a minor child had been awarded was authorized to fix the child's place of residence. In re Metcalf's Estate, 93 M 542, 546, 19 P 2d 905.

Oregon court had jurisdiction to award custody of children where both parties in a divorce action were before the court although the father then left the state with the children before the decree was rendered. The mother who was awarded the custody of the children had the right to fix their residence and their residence

could not be changed except by the mother. Application of Butts, 129 M 440, 289 P 2d 949.

Domicile of Minor Children of Divorced Parents

Minor children whose parents are divorced take the domicile of the parent to whose custody they have been legally given. Application of Enke, 129 M 353, 287 P 2d 19, 22, cert. den. 350 U S 923, 100 L Ed 808, 76 S Ct 212.

Collateral References

Parent and Child 2. 67 C.J.S. Parent and Child § 11.

Nonresidence as affecting one's right to custody of child. 15 ALR 2d 432.

Power of infant on death of both parents to change domicile. 32 ALR 2d 868.

61-122. (5851) Custody may be awarded without divorce proceedings when parents separated. When a husband and wife live in a state of separation, without being divorced, any court of competent jurisdiction, upon application of either, if an inhabitant of this state, may inquire into the custody of any unmarried minor child of the marriage, and may award the custody of such child to either for such time and under such regulations as

the case may require. The decision of the court must be guided by the rules prescribed in section 91-4515.

History: En. Sec. 301, Civ. C. 1895; re-en. Sec. 3759, Rev. C. 1907; re-en. Sec. 5851, R. C. M. 1921. Cal. Civ. C. Sec. 214. Field Civ. C. Sec. 106.

Collateral Reference

Parent and Child \$\infty 2(4).
67 C.J.S. Parent and Child § 13.
39 Am. Jur. 604, Parent and Child,
§§ 18-25.

61-123. (5852) Child legitimatized by marriage of parents. A child born before wedlock becomes legitimate by the subsequent marriage of its parents.

History: En. Sec. 11, p. 410, Bannack Stat.; re-en. Sec. 11, p. 521, Cod. Stat. 1871; re-en. Sec. 864, 5th Div. Rev. Stat. 1879; re-en. Sec. 1425, 5th Div. Comp. Stat. 1887; amd. Sec. 302, Civ. C. 1895; re-en. Sec. 3760, Rev. C. 1907; re-en. Sec. 5852, R. C. M. 1921. Cal. Civ. C. Sec. 215.

marriage of the parents of a child born to them out of wedlock it becomes legitimate for all purposes. In re Wray's Estate, 93 M 525, 540, 19 P 2d 1051.

Operation and Effect

Under this section, upon the subsequent

Collateral References

Bastards € 12. 10 C.J.S. Bastards § 12.

61-124. (5853) Duty of child to support indigent parents. It is hereby declared and made the duty of every adult child, having the ability so to do, to furnish and provide necessary food, clothing, shelter, and medical attendance for his indigent parent or parents, unless, in the judgment of the court or jury, he is excused therefrom by reason of intemperance, indolence, immorality, or profligacy of such parent.

History: En. Sec. 1, Ch. 42, L. 1915; re-en. Sec. 5853, R. C. M. 1921.

Requirement May Be Consideration for a Promise—To What Extent

While an existing legal obligation, such as that required by this section is a good consideration for a promise under section 13-502, "to an extent corresponding with the extent of the obligation, but no further or otherwise," that is not to say that it is such a consideration as to make defendant a purchaser in good faith and for a valuable consideration, so as to entitle

him to plaintiff's property under section 73-202, the recording statute. Kelly v. Grainey, 113 M 520, 534, 129 P 2d 619.

References

Barbour v. Barbour, 134 M 317, 330 P 2d 1093, 1098; Laukaitis v. Sisters of Charity of Leavenworth, 135 M 469, 342 P 2d 752.

Collateral References

Parent and Child 4.
67 C.J.S. Parent and Child § 24.
39 Am. Jur. 711, Parent and Child, § 70.

61-125. (5854) Penalty for failure to support. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor.

History: En. Sec. 2, Ch. 42, L. 1915; re-en. Sec. 5854, R. C. M. 1921.

References

Barbour v. Barbour, 134 M 317, 330 P. 2d 1093, 1098.

61-126. (5855) Civil action to enforce duty to support. A civil suit may be instituted and maintained for the enforcement of the provisions of this act by any such child, where there is more than one adult child, or by the parent to whom such support is due, or by the county attorney, and in case there is more than one such child, the court or the jury upon the hearing is authorized and empowered to apportion the expenses of such support between the adult children, and the court shall enter judgment in accordance with such finding and apportionment; provided, that such civil

action shall not be construed as barring the arrest and conviction of such person for misdemeanor.

History: En. Sec. 3, Ch. 42, L. 1915; re-en. Sec. 5855, R. C. M. 1921.

Cross-References

Support orders, reciprocal enforcement, secs. 93-2601-1 to 93-2601-40. See also support requirements under public welfare statutes, secs. 71-233 to 71-240.

References

Barbour v. Barbour, 134 M 317, 330 P 2d 1093, 1098.

Collateral References

Parent and Child 4; Paupers 37(2). 67 C.J.S. Parent and Child § 24; 70 C.J.S. Paupers § 61.

39 Am. Jur. 664, Parent and Child, § 45.

61-127 to 61-137. (5856 to 5866) Repealed—Chapter 199, Laws of 1961.

Repeal

These sections (Sec. 1, p. 229, L. 1897; Sec. 1, Ch. 140, L. 1907; Sec. 1, Ch. 177, L. 1931; Sec. 1, Ch. 115, L. 1941; Sec. 1, Ch. 116, L. 1943; Sec. 1, Ch. 181, L. 1945; Sec. 1, Ch. 51, L. 1947; Sec. 1, Ch. 180,

L. 1949; Sec. 1, Ch. 181, L. 1949; Sec. 1, Ch. 206, L. 1951; Sec. 1, Ch. 11, L. 1953; Sec. 1, Ch. 208, L. 1955), relating to the adoption of children, were repealed by Sec. 1, Ch. 199, Laws 1961.

61-138. (5867) Repealed—Chapter 181, Laws of 1949.

Repeal

This section (Sec. 2, p. 230, L. 1897; Sec. 1, Ch. 62, L. 1909), relating to the adoption of children from an orphans'

home or asylum, was repealed as Sec. 5867, Revised Codes 1935, by Sec. 2, Ch. 181, Laws 1949.

61-139. Adoption of adult. A person who is an adult and has attained his or her age of legal majority may be adopted without the consent of his or her parents.

History: En. Sec. 1, Ch. 229, L. 1947.

61-140. Procedure applicable. That, except as otherwise inconsistent with this act, the procedure and law for adoption of minors set forth in sections 61-203, 61-204, 61-208, 61-210, 61-211, and 61-212, shall be applicable in proceedings for the adoption of an adult under the provisions of this act; provided, however, that provisions concerning an interlocutory decree shall not be applicable in the case of the adoption of an adult.

History: En. Sec. 2, Ch. 229, L. 1947; amd. Sec. 5, Ch. 199, L. 1961.

CHAPTER 2

ADOPTION

Section 61-201. Definitions.

61-202. Who may be adopted.

61-203. Who may adopt.

Venue. 61-204.

61-205. Persons required to consent to the adoption.

61-206. Withdrawal of consent.

61-207. Consent of the child.

61-208. Petition for adoption.

61-209. Investigation.

61-210. Summary decree.

61-211. Interlocutory and final decree.
61-212. Effect of final decree.
61-213. Confidential nature of record and proceedings.

61-214. Appeal.

61-215. Foreign adoption decrees. 61-216. Uniformity of interpretation.

61-217. Short title.

61-218. Minor parent.

61-201. Definitions. As used in this act, unless the context otherwise requires, "child" means any minor person, and "agency" means any person, authority or agency legally empowered to place children for adoption. Singular words may extend and be applied to several persons or things, as well as to one person or thing. Plural words may extend and be applied to one person or thing, as well as to several persons or things.

History: En. Sec. 1, Ch. 240, L. 1957.

NOTE.—Uniform State Law. Sections 61-201 through 61-217 constitute the significant sections of the "Uniform Adoption Act" approved by the National Conference of Commissioners on Uniform State Laws in 1953 and adopted in the state of Oklahoma.

Cross-Reference

Application of Montana Rules of Civil Procedure to this chapter, sec. 93-2711-7.

Law Review

Cromwell, "The Improvement of Conveyancing in Montana—A Proposal," 22 Mont. L. Rev. 26, 35 (Fall 1960).

61-202. Who may be adopted. Any child present within this state at the time the petition for adoption is filed, irrespective of place of birth or place of residence, may be adopted.

History: En. Sec. 2, Ch. 240, L. 1957.

- **61-203.** Who may adopt. The following persons are eligible to adopt a child:
- (1) A husband and wife jointly, or either the husband or wife if the other spouse is a parent of the child.
 - (2) An unmarried person who is at least 21 years old.
- (3) A married person at least 21 years old who is legally separated from the other spouse.
 - (4) In the case of an illegitimate child, its unmarried father or mother.

History: En. Sec. 3, Ch. 240, L. 1957.

Cross-Reference

Child adoption agencies, secs. 10-701 to 10-706.

Collateral References

Adoption = 1, 4. 2 C.J.S. Adoption of Children §§ 1, 2, 4, 8-12. 1 Am. Jur. 627, Adoption of Children, § 12.

Religion as factor in adoption proceedings. 23 ALR 2d 701.

Race as factor in adoption proceedings. 54 ALR 2d 909.

Age of prospective adopting parent as factor in adoption proceedings. 56 ALR 2d

DECISIONS UNDER FORMER LAW

Age of Adopting Parent

Under sections 61-127 and 61-128, the adoption of one who is past the age of majority, or by one who is not at least ten years older than the person sought to be adopted, is not permissible. Hendy v. Industrial Accident Board, 115 M 516, 518, 146 P 2d 324.

Under section 61-128 an adoption was impossible where the party assuming to adopt was less than ten years older than

the one to be adopted. Hendy v. Industrial Accident Board, 115 M 516, 518, 146 P 2d 324.

Citizenship

Under section 61-127, only persons who were or might become citizens of the United States could adopt a minor child. State ex rel. Thompson v. District Court, 75 M 147, 156, 242 P 959, overruled on another point, 108 M 386, 390, 91 P 2d 394.

Racial Factor

The fact that the person adopting and the one adopted were of different races did not constitute an obstacle to adoption under section 61-127 as it appeared as section 310 of the Civil Code of 1895. In re Pepin's Estate, 53 M 240, 248, 163 P 104.

61-204. Venue. Proceedings for adoption must be brought in the district court of the county where the petitioners reside.

History: En. Sec. 4, Ch. 240, L. 1957.

- 61-205. Persons required to consent to the adoption. An adoption of a child may be decreed when there have been filed written consents to adoption executed by:
- (1) Both parents, if living, or the surviving parent, of a legitimate child; provided, that consent shall not be required from a father or mother,
- (a) adjudged guilty by a court of competent jurisdiction of physical cruelty toward said child; or,
 - (b) adjudged to be an habitual drunkard; or,
- (c) who has been judicially deprived of the custody of the child on account of cruelty or neglect toward the child; or,
- (d) who has, in the state of Montana, or in any other state of the United States, willfully abandoned such child; or,
- (e) who has caused the child to be maintained by any public or private children's institution, charitable agency, or any licensed adoption agency, or the state department of public welfare of the state of Montana for a period of one (1) year without contributing to the support of said child during said period, if able; or,
- (f) if it is proven to the satisfaction of the court that said father or mother, if able, has not contributed to the support of said child during a period of one (1) year before the filing of a petition for adoption; or (an adoption of a child may be decreed when there have been filed written consents to adoption executed by).
 - (2) The mother, alone, if the child is illegitimate; or,
- (3) The legal guardian of the person of the child if both parents are dead or if the rights of the parents have been terminated by judicial proceedings and such guardian has authority by order of the court appointing him to consent to the adoption; or,
- (4) The executive head of an agency if the child has been relinquished for adoption to such agency or if the rights of the parents have been judicially terminated, or if both parents are dead, and custody of the child has been legally vested in such agency with authority to consent to adoption of the child; or,
- (5) Any person having legal custody of a child by court order if the parental rights of the parents have been judicially terminated, but in such case the court having jurisdiction of the custody of the child must consent to adoption, and a certified copy of its order shall be attached to the petition.

The consents required by paragraphs (1) and (2) shall be acknowledged before an officer authorized to take acknowledgments, or witnessed by a representative of the state department of public welfare or of an agency, or witnessed by a representative of the court.

History: En. Sec. 5, Ch. 240, L. 1957; amd. Sec. 2, Ch. 199, L. 1961.

Compiler's Note

The words enclosed in parentheses and appearing at the end of paragraph (1)(f) appeared in the 1961 amendatory act but are apparently surplusage.

Collateral References

Adoption 7.

2 C.J.S. Adoption of Children §§ 19, 21. 1 Am. Jur. 639, Adoption of Children, § 36.

Annulment or vacation of adoption decree by adopting parent or natural parent consenting to adoption. 2 ALR 2d 887.

Sufficiency of parents consent to adoption of child. 24 ALR 2d 1127.

What constitutes abandonment or desertion of child by its parent or parents within purview of adoption laws. 35 ALR 2d 662.

Mental illness and the like of parents as ground for adoption of their children. 45 ALR 2d 1379.

Consent of natural parents as essential to adoption where parents are divorced. 47 ALR 2d 824.

Necessity of securing consent of parents of illegitimate child to its adoption. 51 ALR 2d 497.

DECISIONS UNDER FORMER LAW

Abandonment By Parent

Where the complaint in an action to establish plaintiff's claim to an estate under a contract of adoption, alleged that her father had abandoned her, the truth of which was admitted by a demurrer, it was sufficient as against the contention that it did not show that he had either given his consent to the adoption or had been legally deprived of her custody. Gravelin v. Porier, 77 M 260, 279, 250 P 823.

Consent of Stepfather Not Necessary

The provision of section 61-130, that a legitimate child could not be adopted without the consent of its "parents," referred only to the lawful father and mother by blood, and not to a stepfather or stepmother, and the consent of a stepfather to the adoption of children of his deceased wife by their aunt was not necessary. State ex rel. Sheedy v. District Court, 66 M 427, 431, 213 P 802, distinguished in 119 M 143, 149, 173 P 2d 626.

Necessity of Consent of Both Parties

Under section 61-130, providing that a legitimate child cannot be adopted without the consent of its parents, and section 61-132, declaring that consent must be in writing, the court was without jurisdiction to enter an order of adoption where, the father consenting, the written consent of the mother was absent. State ex rel. Thompson v. District Court, 75 M 147, 150, 242 P 959, overruled in In re Hoermann's Estate, 108 M 386, 390, 91 P 2d 394.

Notice to Absent Parent

While the adoption statute does not provide in express terms for notice to an absent parent of an application of adoption, it does so by necessary implication, and where notice was not given to enable the parent to defend against the charge of abandonment, the court was without power

to issue an order of adoption. State ex rel. Thompson v. District Court, 75 M 147, 150, 242 P 959, overruled in In re Hoerman's Estate, 108 M 386, 390, 91 P 2d 394.

man's Estate, 108 M 386, 390, 91 P 2d 394. The word "may," as used in section 61-130 which authorized the court to give notice to parents even when the consent of the parent was not needed for adoption, was mandatory where a third party or the public had an interest in the exercise of the power; thus a parent who had regularly adopted a minor child was entitled to notice of the filing of the petition for her adoption by his former wife and her new husband, thus affording him the opportunity to be heard and to show cause why the order for such adoption depriving him of his rights and interests in his child should not be made. In re Adoption of Bascom, 126 M 129, 246 P 2d 223, 225, 226, 227.

Presumption that Provisions Complied with, When Judgment Attacked Collaterally

As against contention that in adoption proceedings, unknown to the common law, every fact essential to jurisdiction must affirmatively appear of record to uphold a judgment, held, that the district court, when acting in such proceedings exercises its jurisdiction as a court of record and not as one of limited jurisdiction, and such judgments on collateral attack, are attended with the presumption that the law was complied with. In re Hoermann's Estate, 108 M 386, 390, 91 P 2d 394, overruling State ex rel. Thompson v. District Court, 75 M 147, 242 P 959.

When Public Welfare Department in Loco Parentis

Where department of public welfare to which court awarded minor children on ground that the children were dependent and neglected, refused to give its consent to adoption of two of those children by

those seeking to adopt them, court could not make an adoption order since the department was in loco parentis to the chil-

dren. State ex rel. Frederick v. District Court, 119 M 143, 173 P 2d 626, 629.

61-206. Withdrawal of consent. Withdrawal of any consent filed in connection with a petition for adoption hereunder, shall not be permitted, except that the court, after notice and opportunity to be heard is given to the petitioner, to the person seeking to withdraw consent, and to any agency participating in the adoption proceedings, may, if it finds that the best interests of the child will be furthered thereby, issue a written order permitting the withdrawal of such consent. The entry of the interlocutory or final decree of adoption renders any consent irrevocable.

History: En. Sec. 6, Ch. 240, L. 1957.

61-207. Consent of the child. Consent of the child if twelve years of age or over, shall be required. Such consent shall be given in court, or be in writing, in such form as the court shall direct.

History: En. Sec. 7, Ch. 240, L. 1957. Collateral References Adoption ∞7. 2 C.J.S. Adoption of Children §§ 4, 18-25. 1 Am. Jur. 640, Adoption of Children, § 38.

61-208. Petition for adoption. (1) A petition for adoption shall be filed in duplicate, verified by the petitioners, and shall specify:

(a) The full names, ages and place of residence of the petitioners, and, if married, the place and date of the marriage.

(b) When the petitioners acquired or intend to acquire custody of the child and from what person or agency.

(c) The date and place of birth of child, if known.

- (d) The name used for the child in the proceeding, and if a change in name is desired, the new name.
- (e) That it is the desire of the petitioners that the relationship of parent and child be established between them and the child.
- (f) A full description and statement of value of all property owned or possessed by the child.
- (g) Facts, if any, which excuse consent on the part of a parent, to the adoption.
- (2) One copy of the petition shall be retained by the court. The other shall be sent to the state department of public welfare and to any agency participating in the adoption proceeding.
- (3) Any written consent required by this act may be attached to the petition, or may be filed, after the filing of the petition, with the consent of the court.

History: En. Sec. 8, Ch. 240, L. 1957.

Collateral References
Adoption ≈11.
2 C.J.S. Adoption of Children § 37.

61-209. Investigation. (1) Upon the filing of a petition for adoption the court may in its discretion order an investigation to be made by the state department of public welfare or any other private agency licensed and approved for such investigatory purposed by the state department of public welfare, and may in its discretion further order that a report of such

ADOPTION 61-211

investigation shall be filed with the court by the designated investigator within the time fixed by the court and in no event more than thirty (30) days from the issuance of the order for investigation, unless time therefor is extended by the court. Such investigation if ordered by the court shall include the conditions and antecedents of the child for the purpose of determining whether he is a proper subject for adoption; appropriate inquiry to determine whether the proposed home is a suitable one for the child; and any other circumstances and conditions which may have a bearing on the adoption and of which the court should have knowledge.

- (2) The court may order agencies named in subsection (1) of this section located in one or more counties to make separate investigations on separate parts of the inquiry as may be appropriate.
- (3) The report of such investigation shall become a part of the files in the case and shall contain a definite recommendation for or against the proposed adoption and state reasons therefor.

History: En. Sec. 9, Ch. 240, L. 1957.

61-210. Summary decree. If the child is related by blood to one of the petitioners, or is a stepchild of the petitioner, or the court finds that the best interests of the child will be furthered thereby, the court, after examination of the report specified in section 61-209, if such report had been ordered by said court, in its discretion, may waive the entry of an interlocutory decree and the waiting period of six (6) months provided in section 61-211 and grant a final decree of adoption if satisfied that the adoption is for the best interests of the child.

History: En. Sec. 10, Ch. 240, L. 1957; amd. Sec. 3, Ch. 199, L. 1961.

61-211. Interlocutory and final decree. Upon examination of the report described in section 61-209, if such report has been deemed necessary by said court, and after hearing, the court may issue an interlocutory degree giving the care and custody to the petitioners pending the further order of the court.

When a petition has been filed seeking the adoption of a child, the court must cause service of process to be made on the parent or parents of the child, except in those cases hereinafter provided, in the following manner:

The court shall order a citation to issue to the parent or parents in the name of the state of Montana and under the seal of the court, directing such parent or parents to appear in court at a time to be fixed by the court, and show cause why said petition should not be granted. Such citation, together with a copy of the petition for adoption, shall be personally served upon such parent or parents. If, however, any such parent or parents cannot be found within this state, service may be had by publication of a copy of said citation in the manner provided for the publication of summons by section 93-3014. If after completion of such service, any parent so served does not appear, the court may act upon the petition, and the order of the court thereon shall be binding upon all persons so served; provided that any such person shall have the right to appeal from the order

in the manner and form provided for appeals from a judgment in civil actions.

The petitioners and the child shall appear at said hearing, unless the presence of the child is waived by the court.

Service of process, as aforesaid, need not be made on a parent who has consented in writing to an adoption; or on the father of an illegitimate child; or on any parent whose consent to adoption is not required under the provisions of section 61-205; and service of process shall not be made on any parent who has relinquished his child to the state department of public welfare or an adoption agency licensed by the state department of public welfare.

After an interlocutory decree, as aforesaid, has been issued by the court, the investigator, if any, shall observe the child in his adoptive home and report in writing to the court within six (6) months on any circumstances or conditions which may have a bearing on the adoption. After six (6) months from the date of the interlocutory decree, the petitioners may apply to the court for a final decree of adoption. The court shall thereupon set a time and place for final hearing. Notice of the time and date of the hearing shall be served on the state department of public welfare, and the investigator, if any. The investigator, if any, shall file with the court a written report of his findings and recommendations and certify that the described investigation, if any, has been made since the granting of the interlocutory decree. After hearing on said application, at which the petitioners and the child shall appear, unless the presence of the child is waived by the court, the court may enter a final decree of adoption if satisfied that the adoption is for the best interests of the child. If the adoption is denied, an appropriate order shall be made as to the future custody of said child.

History: En. Sec. 11, Ch. 240, L. 1957; amd. Sec. 4, Ch. 199, L. 1961.

Compiler's Note

Section 93-3014, referred to in the third paragraph above, was repealed by Sec. 84, Ch. 13, Laws 1961, and is superseded by Sec. 93-2702-2.

Cross-Reference

Copy of order delivered to registrar of vital statistics, sec. 69-525.

Collateral References

Adoption 9-17.

2 C.J.S. Adoption of Children §§ 35-54. 1 Am. Jur. 633, Adoption of Children, §§ 25 et seq.

DECISIONS UNDER FORMER LAW

Consent of Both Parties

Under section 61-130, providing that a legitimate child cannot be adopted without the consent of its parents, and section 61-132 declaring that consent must be in writing, the court was without jurisdiction to enter an order of adoption where, the father consenting, the written consent of the mother was absent. State ex rel. Thompson v. District Court, 75 M 147, 149 et seq., 242 P 959, overruled in In re Hoermann's Estate, 108 M 386, 393, 91 P 2d 394.

Lack of Residence Not Appearing of Record

Where lack of residence of an adopting parent in the county in which the order

of adoption was made did not appear from the record made in the matter in 1907, and such fact was one of the issues to be determined in the proceeding, such lack did not affect the court's jurisdiction, and the order could not be objected to in a collateral proceeding to vacate it on that ground. In re Hoermann's Estate, 108 M 386, 394, 91 P 2d 394.

Presumption that Provisions Complied with, When Judgment Attacked Collaterally

As against contention that in adoption proceedings, unknown to the common law, every fact essential to jurisdiction must affirmatively appear of record to uphold a judgment, held, that the district court, when acting in such proceedings exercises its jurisdiction as a court of record and not as one of limited jurisdiction, and such judgments on collateral attack, are attended with the presumption that the law was complied with. In re Hoermann's Estate, 108 M 386, 390, 91 P 2d 394, overruling State ex rel. Thompson v. District Court, 75 M 147, 242 P 959.

Valid Order though Parent's Consent Not in Record

Under section 61-132, an adoption order made in 1907 and attacked collaterally, on the ground that the consent of the parent did not appear in the record of the proceeding as required by section 3766, R. C. M. 1907 was validated by such section, particularly where the parent testified in

support of the adoption. In re Hoermann's Estate, 108 M 386, 394, 91 P 2d 394.

When Stranger Estopped to Attack Order

Where all the parties to an adoption proceeding for many years considered it valid and acted on the belief that a valid adoption had taken place, evidence of such fact was properly admitted on a collateral attack by a stranger to the proceedings in an effort to revoke letters of administration of the estate of the adopting parent based on a nomination of the adopted son, and a party thereto or one claiming under him was estopped from attacking the order collaterally some thirty years after it was made. In re Hoermann's Estate, 108 M 386, 397, 91 P 2d 394.

- 61-212. Effect of final decree. (1) After the final decree of adoption is entered the relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between such adopted child and the adoptive parents adopting such child and the kindred of the adoptive parents. From the date of the final decree of adoption, the child shall be entitled to inherit real and personal property from and through the adoptive parents in accordance with the statutes of descent and distribution, and the adoptive parents shall be entitled to inherit real and personal property from and through the child in accordance with said statutes.
- (2) After a final decree of adoption is entered, the natural parents of the adopted child, unless they are the adoptive parents or the spouse of an adoptive parent shall be relieved of all parental responsibilities for said child and have no rights over such adopted child or to his property by descent and distribution.

History: En. Sec. 12, Ch. 240, L. 1957.

Collateral References

Adoption 18-25.

2 C.J.S. Adoption of Children §§ 3, 55-66.

What law, in point of time, governs as

to inheritance from or through adoptive parent. 18 ALR 2d 960.

Applicability of res judicata to decree or judgment in adoption proceedings. 52 ALR 2d 406.

Name of child as changed by adoption. 53 ALR 2d 927.

DECISIONS UNDER FORMER LAW

Adopted Grandchild as "Issue"

Where testatrix included adopted grandchild in her will and therein expressly defined "issue" to include adopted children, this indicated a clear intent to include the adopted grandchild as "issue" in a trust instrument created earlier by the testatrix. Holter v. First Nat. Bank & Trust Co. of Helena, 135 M 27, 336 P 2d 701.

Alternative Methods of Inheritance

Where a claimant sought distribution of a decedent's estate claiming an acknowledgment in writing as required by section 91-404 and an adoption as provided under former section 61-136 and offered proof of her right to inherit under both statutes, the claimant was not precluded from prevailing on the ground that she availed herself of both statutes and that they were alternate methods by which a person may become an heir. In re Glick's Estate, 136 M 176, 346 P 2d 987, 996.

Inheritance from Natural Parents

The adoption of a child did not, under section 61-135, destroy his status as one of the issue of his natural ancestors nor

did the adopted child lose his right to inherit from his natural parent. In re Kay's Estate, 127 M 172, 260 P 2d 391, 395.

Inheritance through Adoptive Parent

As against collateral heirs, an adopted child, in the absence of a will, succeeds to all the estate of the person adopting. In re Pepin's Estate, 53 M 240, 246, 163 P 104.

Under section 61-134 an adopted child did not obtain the status of a natural child as to relatives of the adoptive parent, and the general rule that "issue" does not include an adopted child seeking to inherit through the adoptive parent was not altered. In re Miller's Trust, 133 M 354, 323 P 2d 885, 887.

- 61-213. Confidential nature of record and proceedings. (1) Unless the court shall otherwise order, all hearings held in proceedings under this act shall be confidential and shall be held in closed court without admittance of any person other than interested parties and their counsel.
- (2) All papers and records pertaining to the adoption shall be kept as a permanent record of the court and withheld from inspection. No person shall have access to such records except on order of the judge of the court in which the decree of adoption was entered for good cause shown.
- (3) All files and records pertaining to said adoption proceedings in the county and state departments of public welfare or any authorized agencies shall be confidential and withheld from inspection except upon order of court for good cause shown.

History: En. Sec. 13, Ch. 240, L. 1957.

61-214. Appeal. An appeal may be taken from any final order, judgment or decree rendered hereunder to the district court by any person aggrieved thereby, in the manner provided for appeals from said court in other civil matters.

History: En. Sec. 14, Ch. 240, L. 1957.

61-215. Foreign adoption decrees. When the relationship of parent and child has been created by a decree of adoption of a court of any other state or nation, the rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined by section 61-212.

History: En. Sec. 15, Ch. 240, L. 1957.

61-216. Uniformity of interpretation. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 16, Ch. 240, L. 1957.

61-217. Short title. This act may be cited as the "Uniform Adoption Act."

History: En. Sec. 17, Ch. 240, L. 1957.

61-218. Minor parent. A parent who is a minor shall have the right to relinquish his or her child for adoption, and such relinquishment shall not be subject to revocation by reason of such minority.

History: En. 61-218 by Sec. 6, Ch. 199, L. 1961,

TITLE 62

PARKS AND PUBLIC RECREATION

Chapter 1. County parks and recreational areas, 62-101, 62-102.

. City, town and school district civic centers, parks and recreational facilities, 62-201 to 62-215.

3. State parks, 62-301 to 62-314.

CHAPTER 1

COUNTY PARKS AND RECREATIONAL AREAS

Section 62-101. Acquisition of land for public recreational purposes. 62-102. Use of land—limitation of expenditures.

62-101. (4444.1) **Acquisition of land for public recreational purposes.** The several counties of this state are hereby authorized and empowered to acquire by purchase, grant, deed, gift, devise or condemnation, or otherwise, lands suitable for public camping and public recreational purposes, civic centers, youth centers, museums, recreational centers and any combination thereof, or may lease such land tracts, each of which shall be so situated as to offer ready access to a public highway. Nothing herein contained shall be construed as amending or repealing sections 16-1163 to 16-1165.

History: En. Sec. 1, Ch. 51, L. 1929; amd. Secs. 1, 2, Ch. 239, L 1947.

Cross-References

Civic center, power of county to procure, sec. 16-1008.

Park buildings, power of counties to procure, sec. 16-1008.

Youth center, power of county to procure, sec. 16-1008.

62-102. (4444.2) Use of land—limitation of expenditures. All tracts of land acquired under this act shall be set aside and used exclusively for public camping and recreational purposes, and each park so established shall be given an appropriate name or number. No county shall be authorized to expend to exceed five thousand dollars (\$5,000.00) per annum out of the general fund of the county for the purpose of maintaining parks as herein provided. Except as otherwise provided by law, there are no restrictions on expenditures for the purpose of acquiring and equipping county parks.

History: En. Sec. 2, Ch. 51, L. 1929; amd. Sec. 1, Ch. 137, L. 1935; amd. Sec. 1, Ch. 129, L. 1943; amd. Sec. 1, Ch. 115, L. 1945; amd. Sec. 1, Ch. 229, L. 1959.

Collateral References
Counties 107, 153½.
20 C.J.S. Counties §§ 169, 236.

CHAPTER 2

CITY, TOWN AND SCHOOL DISTRICT CIVIC CENTERS, PARKS AND RECREATIONAL FACILITIES

Section 62-201. Public parks and grounds, civic and youth centers—additional indebtedness of municipalities to provide.
62-202. Powers of municipal councils not affected.

- 62-203. Park commissioners-appointment and organization-records and reports.
- 62-204. Powers and duties.
- 62-205. Funds-how disbursed.
- 62-206. Meetings-general regulations.
- 62-207. Allowance of claims.
- Cities and towns authorized to establish swimming pools, skating rinks, playgrounds, civic and youth centers and museums. 62-208.
- Power of municipal council with respect to same. 62-209.
- 62-210. Council's power to procure and set aside land for athletic fields and civic stadiums-jurisdiction.
- Cities and school districts—public recreation—use of park funds. May act independently or in co-operation. 62-211.
- 62-212.
- 62-213. Gifts and bequests accepted.
- Authority of state board of education. 62-214.
- Recreational use of facilities secondary. 62-215.
- (5159) Public parks and grounds, civic and youth centers—additional indebtedness of municipalities to provide. A city or town council, or commission, in addition to the power it now has under the law, has and is hereby granted and given the further power:
- To contract an indebtedness on behalf of a city or town, upon the credit thereof, by borrowing money or issuing bonds for the purpose of purchasing and improving lands for public parks and grounds; and/or for procuring by purchase, or construction, or otherwise, swimming pools, athletic fields, skating rinks, playgrounds, museums, a golf course, a site and building for a civic center, a youth center, or combination thereof, and furnishing and equipping the same; and
- To purchase, build, furnish and equip the same; provided that the total amount of indebtedness authorized to be contracted in any form, including the then existing indebtedness, must not at any time exceed three (3) per centum of the value of the taxable property of the city or town, as ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; and provided, further, that no money must be borrowed on bonds issued for the purchase of lands and improving same for any such purpose, until the proposition has been submitted to the vote of those qualified under the provisions of the state constitution to vote at such election in the city or town affected thereby, and a majority vote cast in favor thereof.

History: En. Sec. 1, Ch. 55, L. 1909; re-en. Sec. 5159, R. C. M. 1921; amd. Sec. 1, Ch. 114, L. 1923; amd. Sec. 1, Ch. 71, L. 1945; amd. Sec. 1, Ch. 64, L. 1947.

Cross-References

Injury to trees in parks, sec. 94-3324. Tax levy for playgrounds, sec. 84-4701.

Hames v. Polson, 123 M 469, 215 P 2d

950; Dietrich v. Deer Lodge, 124 M 8, 218 P 2d 708, 710.

Collateral References

Municipal Corporations \$\infty\$210, 918(1). 62 C.J.S. Municipal Corporations § 646; 64 C.J.S. Municipal Corporations § 1920. 39 Am. Jur. 806, Parks, Squares, and Playgrounds, §§ 7 et seq.

62-202. (5160) Powers of municipal councils not affected. Nothing in this act shall be so construed as to repeal or annul sections 11-901 to 11-988, or any part or portion thereof.

History: En. Sec. 2, Ch. 55, L. 1909; re-en. Sec. 5160, R. C. M. 1921.

Collateral References

Municipal Corporations \$\sim 859. 64 C.J.S. Municipal Corporations § 1883.

- 62-203. (5161) Park commissioners—appointment and organization records and reports. (1) There may be created in all cities of the first and second class a board of park commissioners, whether such cities be a council form of government or city manager form, which shall be composed of the mayor or city manager of the city and six other persons, to be appointed by the mayor or city manager of the city with the approval of the city council. The six persons so to be appointed shall have the same qualifications for the office of park commissioners as are required by section 11-710, for the office of mayor or city manager. The term of office of each park commissioner shall be two years from and after the first day of May of the year in which he is appointed, and until his successor is appointed and qualified, save and except that three of the commissioners first appointed shall hold office for the period of one year from and after the first day of May, 1940, and until their successors are appointed and qualified. Such board of park commissioners shall constitute a department of the city government with the powers in this act provided. Before entering upon the discharge of his duties, each park commissioner shall take and subscribe the oath provided by section 59-413, which oath shall be filed in the office of the city clerk.
- On the first Monday in May in each year, said board of park commissioners shall meet and organize by electing one of their number president, and one of their number vice-president, who shall hold their offices respectively for the term of one year. The president, and in his absence, the vice-president, shall preside at all meetings of the board, and shall countersign all warrants issued by the board, and perform such other duties as shall be required and directed by the board. The city clerk shall be ex officio clerk of the board of park commissioners, and shall attend all meetings of said board and keep correct minutes of all proceedings of said board in a book to be provided for that purpose by it, to be called "record of board of park commissioners of the city of" It shall be the duty of the city clerk, as such clerk of the board of park commissioners, to keep an accurate account of all transactions of said board separate from other city accounts, and to make and submit in writing to said board at the first meeting in January in each year a report under oath showing in detail all the receipts and disbursements made by the board during the year, which report shall be in duplicate, and after being approved by said board, one of said duplicates shall be filed in the office of the city clerk and one in the office of the city treasurer, and he shall perform such other services as the board shall require. In the absence of the clerk at any meeting held by the board, it shall designate one of its number as clerk pro tem. to keep the minutes of said meeting, which minutes shall be delivered to the clerk to be transcribed into the record book of said board. The minutes of said meeting in said record book contained, when approved by the board, shall be prima-facie evidence of the matters and things therein recited in any court of this state.

History: En. Sec. 1, p. 73, L. 1901; re-en. Sec. 3318, Rev. C. 1907; amd. Sec. 1, Ch. 101, L. 1913; re-en. Sec. 5161, R. C. M. 1921; amd. Sec. 1, Ch. 32, L. 1939.

NOTE.—In the case of Gerry v. Edwards, 42 M 135, 111 P 734, the supreme

court held the act of 1901 referred to in the history of the above section unconstitutional in so far as it attempted to confer upon the park board the power to levy taxes and violative of the theory of local self-government.

Operation and Effect

Matters pertaining to the creation and maintenance of public parks in cities are of a purely local and private concern, over which, under the doctrine of self-government, the municipalities have exclusive control. State ex rel. Gerry v. Edwards,

42 M 135, 151, 111 P 734, distinguished in 102 M 27, 39, 55 P 2d 671.

Collateral References

Municipal Corporations ≈210. 62 C.J.S. Municipal Corporations § 647 et seq.

- **62-204.** (5162) **Powers and duties.** The board of park commissioners shall have the management and control of all parks belonging to the city, and of all trees and other plants upon the streets, avenues, boulevards, and public places within the city, and the right to designate the character and quality of all trees and plants planted in such parks, streets, avenues, boulevards, and public places. Said board of park commissioners shall have the following powers and be charged with the following duties:
- 1. To lay out, establish, improve, and maintain parkways, drives, and walks in the parks of the city, and to make plats thereof and to file the same in the office of the city clerk, and to determine when and what parks shall be opened to the public.
- 2. To cultivate, plant, maintain, and improve all trees and other plants required to be planted, cultivated, and maintained in the parks belonging to the city, and in the streets, avenues, boulevards, and public places in the city, and for that purpose to establish and maintain nurseries for the growth of trees and plants.
- 3. To make all rules and regulations necessary or convenient to protect and promote the growth of trees and plants in parks, streets, avenues, alleys, boulevards, and public places under the care and control of said board, and for the protection of all birds inhabiting, frequenting or nesting in such parks, streets, avenues, boulevards, and public places, and all rules and regulations for the use of parks by the public, and to provide penalties for the violation of such rules and regulations, which rules and regulations shall have the force of city ordinances and be enforced in like manner as ordinances of the city are enforced.
- 4. To employ and discharge workmen, laborers, engineers, foresters, and others, and to fix their compensation, which shall not be less than the union scale of wages in force in each individual city of the first class; and to make all contracts necessary or convenient for carrying out any and all of the powers conferred and duties enjoined upon said board by this act, and to pay all obligations authorized to be incurred by the provisions of this act.
- 5. To lease all lands owned by the city heretofore acquired for parks, whether within or without the city, which, in the judgment of the board, it shall not be advisable to improve as parks, upon such terms and conditions as the board shall deem to be for the best interests of the city; provided, that such lands shall not be leased for a longer term at any one time than five years, and not for a longer time than one year without the concurrence of two-thirds of the entire board of park commissioners.
- 6. To exercise all other powers incident to the duties enjoined by the provisions of this act.

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History: En. Sec. 2, p. 75, L. 1901; re-en. Sec. 3319, Rev. C. 1907; re-en. Sec. 5162, R. C. M. 1921.

NOTE.—See note to preceding section. So much of the above section as was declared unconstitutional was omitted from the code by the code commissioner, 1921.

References

State ex rel. Gerry v. Edwards, 42 M 135, 141, 111 P 734.

62-205. (5163) Funds—how disbursed. All moneys paid out by the park commissioners under the provisions of this act shall be by warrant drawn upon the city treasurer, which shall be signed by the city clerk and countersigned by the president, or, in his absence by the vice-president of the board of park commissioners. All moneys raised by tax for park purposes, or received by the board of park commissioners for the sale of hay, trees, plants, or from the leasing of park lands, or from any other source, shall be paid into the city treasury, and the city treasurer shall keep all such moneys in a separate fund to be known as the park fund. Such board shall have no power to incur liability on behalf of the city in excess of moneys on hand in, or taxes actually levied for, said park fund.

History: En. Sec. 3, p. 76, L. 1901; reen. Sec. 3320, Rev. C. 1907; reen. Sec. 5163, R. C. M. 1921.

Collateral References

Collateral References

public square. 60 ALR 2d 239.

Power of municipal corporation to ex-

Relative rights, as between municipality

change its real property used for a park or

and abutting landowners, to minerals, oil,

and gas underlying parks. 62 ALR 2d

Municipal Corporations ≥887, 897. 64 C.J.S. Municipal Corporations §§ 1884, 1893.

62-206. (5164) Meetings—general regulations. Said board of park commissioners shall hold an annual meeting on the first Monday of May, and a meeting at least once in each month in each year, at such times as the board shall by rule prescribe. Special meetings may also be held at the call of the president, or, in his absence, the vice-president, upon giving to each member of said board at least twenty-four hours' notice in writing of the time and place of holding such meeting. A majority of the entire board shall be necessary to constitute a quorum for the transaction of the business of said board. No park commissioner shall receive compensation for his services rendered under the provisions of this act, but the actual and necessary expense incurred by any member of the board while acting under the orders of the board in the transaction of any business in its behalf may be paid upon being allowed and audited by the board. No park commissioner shall be interested in any contract made by the board or by its authority, or in the furnishing of any supplies for the use of the board. Any park commissioner who shall refuse or neglect, for the period of three consecutive months, to attend the meetings of said board without leave of absence from said board, or who shall fail for the period of twenty days from and after his appointment to qualify as in this act provided, shall be deemed to have vacated his office, and thereupon his successor may be appointed. All contracts made by said board shall be in the name of the city, and shall be signed by the city clerk and by the president, or, in his absence, by the vice-president, of said board.

History: En. Sec. 4, p. 77, L. 1901; re-en. Sec. 3321, Rev. C. 1907; re-en. Sec. 5164, R. C. M. 1921.

62-207. (5165) Allowance of claims. Said board of park commissioners shall, at its first regular meeting in each month, audit and allow all just claims against the city, liability for which shall have been incurred by said board; but no claim shall be audited or paid until an itemized account of such claim in writing, verified by the oath of the claimant or his or its authorized agent, shall have been filed in the office of the clerk of said board; provided, that no order or resolution providing for the payment or expenditure of money, or creating an obligation in excess of the sum of twenty-five dollars, or authorizing the making of any contract, shall be passed or adopted except by a yea and nay vote, which vote shall be recorded in full in the minutes by the clerk.

History: En. Sec. 6, p. 78, L. 1901; reen. Sec. 3323, Rev. C. 1907; re-en. Sec. 5165, R. C. M. 1921.

Collateral References

Municipal Corporations € 1009. 64 C.J.S. Municipal Corporations § 2176 et seq.

62-208. (5166) Cities and towns authorized to establish swimming pools, skating rinks, playgrounds, civic and youth centers and museums. All cities or towns incorporated under the laws of the state of Montana, in addition to other powers conferred upon them, may, in their discretion, procure, construct, establish, maintain, and operate swimming pools, skating rinks, playgrounds, civic centers, youth centers, and museums, and to defray the cost and expense of procuring, constructing, establishing, equipping, maintaining, and operating the same from the funds of said city or town raised for such purposes.

History: En. Sec. 1, Ch. 41, L. 1917; re-en. Sec. 5166, R. C. M. 1921; amd. Sec. 1, Ch. 60, L. 1941; amd. Sec. 2, Ch. 71, L. 1945.

Cross-Reference

City may levy tax for museum, sec. 84-4701.

Operating Swimming Pool Not Governmental Function

The operation by a municipal corpora-

tion of a public swimming pool is a "proprietary" and not a "governmental function" and the municipality is liable, in a proper case, for tortious acts of its officers and employees in such operation. Felton v. City of Great Falls, 118 M 586, 169 P 2d 229, 231.

Collateral References

Municipal Corporations \$276. 63 C.J.S. Municipal Corporations §1057 et seq.

62-209. (5167) Power of municipal council with respect to same. Power and authority is hereby granted to the city or town council of all cities and towns incorporated under the laws of the state of Montana to make and pass all bylaws, ordinances, resolutions, rules and orders necessary for the procurement, establishment, equipment, maintenance, regulation and operation of swimming pools, skating rinks, playgrounds, civic centers, youth centers, museums, and combinations thereof, including the power to establish by ordinance a reasonable and uniform charge for the privilege of using the same. Said city or town council is further authorized in its discretion to place any or all of said institutions under the control and management of the board of park commissioners.

History: En. Sec. 2, Ch. 41, L. 1917; 2, Ch. 60, L. 1941; amd. Sec. 3, Ch. 71, L. re-en. Sec. 5167, R. C. M. 1921; amd. Sec. 1945.

62-210. (5167.1) Council's power to procure and set aside land for athletic fields and civic stadiums—jurisdiction. Every city or town council

shall have power to acquire by gift, purchase or condemnation, lands for athletic fields and civic stadiums within or without the corporate limits of the municipality, to establish and regulate such fields and civic stadiums, to exercise municipal jurisdiction over the lands so acquired where such lands, or any portion thereof, are without corporate limits of the municipality to the same extent as though they were within said corporate limits and the city or town councils are authorized to set aside or designate portions or tracts of land now owned by any municipality for the purpose of providing athletic fields and civic stadiums and also to construct, maintain and regulate athletic and civic stadiums thereon.

History: En. Sec. 1, Ch. 68, L. 1929.

62-211. Cities and school districts—public recreation—use of park funds. Any city or town, including any board of park commissioners, may expend funds from the band fund and the park fund of said city or town, and any school district, or board thereof, may co-operate for the purpose of operating a program of public recreation and playgrounds; and acquire, equip and maintain land, buildings, and/or other recreation facilities.

History: En. Sec. 1, Ch. 71, L. 1939.

Collateral References

Municipal Corporations ₹ 721(1). 64 C.J.S. Municipal Corporations § 1818.

62-212. May act independently or in co-operation. Any city, town, school district, or any board thereof, including board of park commissioners, may operate such a program independently or may co-operate in its operation and conduct with any other body authorized hereby to conduct such a program and in any manner upon which they may mutually agree; or it or they may delegate the operation of the program to a board of recreation created by any city, town, school district, or any board thereof, including any board of park commissioners, operating or proposing to operate a program independently or with any co-operating bodies in such manner as they may agree, and all moneys appropriated for the purposes of such program may be expended by such board.

History: En. Sec. 2, Ch. 71, L. 1939.

Leases of Property

Acts 1939, Ch. 71 (62-211 to 62-215) does not authorize the leasing of trust property. Hames v. Polson, 123 M 469, 215 P 2d 950.

Legislature could not authorize a city to delegate municipal functions such as the leasing of park grounds to a special park board composed of a member of the city council and two members of the private club to whom the grounds were leased. Hames v. Polson, 123 M 469, 215 P 2d 950.

- **62-213.** Gifts and bequests accepted. Any corporation, board, or body hereinbefore designated, given authority to operate and conduct a recreation program, or given charge of such program, is authorized to accept gifts and bequests in the name or names of the sponsors of said program, as said sponsors may agree, for the benefit of said recreational work, to employ directors and instructors of said recreational work, and to conduct its activities on:
 - (1) Property under its custody and management;

- (2) Other public property under the custody of any other public corporation, body, or board, with the consent of such corporation, body, or board: and
 - Private property, with the consent of its owners.

History: En. Sec. 3, Ch. 71, L. 1939.

- 62-214. Authority of state board of education. In all cases where school property is utilized, the state board of education shall have authority:
- (1) To establish minimum qualifications of local recreational directors and instructors; and
- (2) To prepare, or cause to be prepared, published and distributed, adequate and appropriate manuals and other materials as it may deem necessary or suitable to carry on said recreational program and to carry out the provisions of this act.

History: En. Sec. 4, Ch. 71, L. 1939.

Collateral References

Schools and School Districts 47. 78 C.J.S. Schools and School Districts \$ 86.

62-215. Recreational use of facilities secondary. The facilities of any school district operating a recreational program pursuant to the provisions of this act shall be used primarily for the purpose of conducting a regular school curriculum and the use of school facilities for recreational purposes authorized by this act shall be secondary.

History: En. Sec. 5, Ch. 71, L. 1939.

CHAPTER 3

STATE PARKS

Section 62-301. Purpose.

62-302. Repealed.

62-303. Repealed.

62-304. Powers and duties.

62-305. Fees and charges-state park fund.

62-306. Rules and regulations—penalties.

62-307. Connecting roads, 62-308. Co-operation, 62-309. Reports.

62-310. Establishment of state scientific and recreational park.

62-311. State highway commission to establish rules governing use.

62-312. State parks and recreational and camping grounds.

62-313.

62-314. Penalties for violation of state park regulations.

62-301. Purpose. That for the purpose of conserving the scenic, historic, archaeologic, scientific and recreational resources of the state, and of providing for their use and enjoyment, thereby contributing to the cultural, recreational and economic life of the people and their health, the state highway commission (hereinafter referred to as commission) is hereby vested with the duties and powers hereinafter set forth.

History: En. Sec. 1, Ch. 48, L. 1939; amd. Sec. 1, Ch. 178, L. 1953.

Collateral References States \$\infty 45.

References

596, 281 P 2d 499, 501.

81 C.J.S. States § 57. State ex rel. Olsen v. Sundling, 128 M

62-302, 62-303. Repealed—Chapter 178, Laws of 1953.

Repeal

These sections (Secs. 2, 3, Ch. 48, L. 1939), relating to the appointment, terms and qualifications of members of the Mon-

tana state park commission, and the organization, officers, and employees of the commission, were repealed by Sec. 6, Ch. 178, Laws 1953.

62-304. Powers and duties. The commission is hereby authorized and directed to make a study to determine the scenic, historic, archaeologic, scientific and recreational resources of the state, and shall have power by purchase, lease, agreement, or by acceptance of donations, or condemnation, to acquire for and in the name of the state, any such areas, sites or objects which in its opinion should be held, improved, and maintained as state parks, state recreational areas, state monuments, or state historical sites. The commission shall also have power in its discretion to receive and accept in the name of the state, in fee or otherwise, any such areas, sites, or objects conveyed, entrusted, donated, or devised to the state, and with like discretion to accept gifts, bequests, or contributions of money or other property to be expended or used for any of the purposes of this act; provided, that no contract shall be entered into or other obligation incurred under the provisions of this act until moneys have been appropriated therefor by the legislature or are otherwise made available as herein provided. The commission shall also have jurisdiction, custody and control of all state parks, recreational areas, public camping grounds, historical sites, and monuments which are now under the control and management of the state, including wayside camps and other public conveniences acquired, improved and maintained by the state highway commission and contiguous to the state highway system.

History: En. Sec. 4, Ch. 48, L. 1939; amd. Sec. 1, Ch. 46, L. 1955.

Bailments

Where the state, as bailee of a road roller given to it by the federal government, was in lawful possession, it was lawfully entitled to that possession as against anyone with no better right. It could vindicate that possession accordingly and to that end maintain an action in

claim and delivery where there was an unauthorized sale by an employee of the state park commission purporting to act for the state to a third person. State ex rel. Olsen v. Sundling, 128 M 596, 281 P 2d 499, 502.

Collateral References

States \$67, 73. 81 C.J.S. States \$66.

62-305. Fees and charges—state park fund. The commission shall have power to levy and collect reasonable fees or other charges for the use of such privileges and conveniences as may be provided, and to grant such concessions as it may deem advisable. All moneys derived from the activities of the commission, and from unconditional gifts, donations, bequests and endowments, shall be deposited in the state treasury to the credit of the state park fund, which fund is hereby created, and shall constitute a continuing fund to be used and expended by the commission for any of the purposes of this act.

History: En. Sec. 5, Ch. 48, L. 1939.

Collateral References States \$\infty\$87, 127. 81 C.J.S. States §§ 105, 158.

62-306. Rules and regulations—penalties. The commission shall have power to make rules and regulations governing the use, occupancy and pro-

tection of the lands and property under its control. Any person who violates any such rule or regulation shall be deemed guilty of a misdemeanor and punished by a fine of not more than one hundred dollars (\$100.00) or by imprisonment for not more than six (6) months, or both, and be adjudged to pay all costs of the proceedings.

History: En. Sec. 6, Ch. 48, L. 1939.

62-307. Connecting roads. The state highway commission is hereby authorized to construct, improve and maintain with state highway funds connecting roads between existing state highways and lands and properties under the jurisdiction of the commission; provided, that each such road shall not exceed a total length of ten (10) miles.

History: En. Sec. 7, Ch. 48, L. 1939; amd. Sec. 2, Ch. 178, L. 1953.

Collateral References Highways \$99, 105(1). 40 C.J.S. Highways §§ 178, 182.

62-308. Co-operation. In carrying out the provisions of this act the commission may seek and accept the co-operation of other state and local agencies, and the agencies of the federal government, and may assist and co-operate with other state agencies, political subdivisions of the state, with neighboring states, and with the federal government in matters relating to acquiring, planning, establishing, developing, improving, or maintaining any park, parkway, recreational area, monument, historic site or archaeological site.

History: En. Sec. 8, Ch. 48, L. 1939.

62-309. Reports. The commission shall on or before the first day of December immediately prior to each regular session of the legislature submit to the governor for transmission to the legislature, a report covering its operations for the preceding biennium, and may include such recommendations relating to the purpose and provisions of this act as may be deemed advisable.

History: En. Sec. 9, Ch. 48, L. 1939.

62-310. Establishment of state scientific and recreational park. That in order to preserve and protect the biological station grounds hereafter referred to, and to remove fire hazards and the danger of other encroachments tending to detract from the scientific values and uses thereof, the state highway commission is authorized to establish and maintain a state scientific and recreational park on a suitable area to be designated by it not exceeding fifteen (15) acres at the southeast portion of the lands granted by the United States of America to the state of Montana for the use of the university of Montana for biological station purposes.

History: En. Sec. 1, Ch. 108, L. 1941; amd. Sec. 3, Ch. 178, L. 1953.

62-311. State highway commission to establish rules governing use. That if and when said park is established, the state highway commission shall make such rules and regulations governing its use, occupancy and the protection of the remaining lands of said grant that the use of all of said lands for biological station purposes shall be promoted and continued;

and the park itself shall be so established and maintained as to develop and encourage public interest in the scientific and biological resources of the area; provided, however, that nothing herein contained shall operate to prevent the use of the area within the said park for biological station purposes whenever it becomes useful or necessary for such purposes.

History: En. Sec. 2, Ch. 108, L. 1941; amd. Sec. 4, Ch. 178, L. 1953.

62-312. (1842.1) State parks and recreational and camping grounds. The state board of land commissioners may acquire and accept title in the name of the state of Montana by grant, dedication, gift, devise, donation or demise, to land suitable for public camping and public recreational use. The state board of land commissioners is hereby authorized to set aside any suitable tract or tracts of state lands for such purpose. Each of the aforesaid tracts of land shall be set aside and used exclusively for public camping and other recreational purposes, and each park created under the provisions of this act shall be given an appropriate name by the state board of land commissioners.

History: En. Sec. 1, Ch. 111, L. 1929.

Collateral References

States@=85.

81 C.J.S. States § 104 et seq. 39 Am. Jur. 811, Parks, Squares, and Playgrounds, §§ 14 et seq.

62-313. (1842.2) Repealed—Chapter 178, Laws of 1953.

Repeal

This section (Sec. 2, Ch. 111, L. 1929), relating to creation and duties of state park director, was repealed by Sec. 6, Ch. 178, Laws 1953.

(1842.3) Penalties for violation of state park regulations. Any person who shall injure or damage in any unusual way any state or private property thereon or therein, or shall violate any of the regulations made by the state highway commission relating to the state parks, shall be guilty of a misdemeanor and shall be fined not more than five hundred dollars (\$500.00) or be imprisoned in the county jail for not more than six (6) months.

History: En. Sec. 3, Ch. 111, L. 1929; amd. Sec. 5, Ch. 178, L. 1953.

Cross-Reference

Injury to trees in parks, penalty, sec. 94-3324.

Collateral References Public Lands \$\infty\$8. 73 C.J.S. Public Lands § 4.

TITLE 63

PARTNERSHIP

- Chapter 1. Partnership in general-preliminary provisions-nature of partnership, 63-101 to 63-108.
 - Partnership in general—relation of partners to persons dealing with the partnership, 63-201 to 63-209.
 - Partnership in general-relation of partners to one another, 63-301 to 63-306.
 - General partnership—property rights of a partner, 63-401 to 63-405. General partnership—dissolution and winding up, 63-501 to 63-515. 4.

 - Partnership—use of fictitious name, 63-601 to 63-606. 6.
 - 7. Special partnership—formation, 63-701 to 63-706.
 - Special partnership—powers, duties and liabilities of partners, 63-801 to 63-813.
 - Special partnership-alteration and dissolution-construction of act-existing partnerships, 63-901 to 63-911.
 - Mining partnership, 63-1001 to 63-1010. 10.

CHAPTER 1

PARTNERSHIP IN GENERAL—PRELIMINARY PROVISIONS— NATURE OF PARTNERSHIP

Section 63-101. Name of act.

- Definition of terms. 63-102.
- 63-103. Interpretation of knowledge and notice.
- 63-104. Rules of construction.
- 63-105. Rules for cases not provided for in this act.
- 63-106. Partnership defined.
- 63-107. Rules for determining the existence of a partnership.
- 63-108. Partnership property.

63-101. Name of act. This act may be cited as Uniform Partnership Act.

History: En. Sec. 1, Ch. 251, L. 1947. Earlier acts relating to general partnerships were Secs. 7982 to 8018, R. C. M. 1935.

NOTE .-- Uniform State Law. Sections 63-101 to 63-515 constitute the "Uniform Partnership Act" approved by the National Conference of Commissioners on Uniform State Laws in 1914 and adopted in the states of Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Minnesota,

Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Caro-lina, South Dakota, Tennessee, Texas, Utah, Verment Virginia, Washington Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming and also in Alaska and Guam.

Collateral References

Partnership 21.

68 C.J.S. Partnership § 1.

40 Am. Jur. 126, Partnership, § 2.

Definition of terms. In this act, "court" includes every court 63-102. and judge having jurisdiction in the case.

"Business" includes every trade, occupation, or profession.

"Person" includes individuals, partnerships, corporations, and other associations.

"Bankrupt" includes bankrupt under the Federal Bankruptcy Act or insolvent under any state insolvent [insolvency] act.

"Conveyance" includes every assignment, lease, mortgage, or encumbrance.

"Real property" includes land and any interest or estate in land.

History: En. Sec. 2, Ch. 251, L. 1947.

Collateral References Partnership = 1.

68 C.J.S. Partnership § 2.

Compiler's Note

The bracketed word "insolvency" was inserted by the compiler.

- **63-103.** Interpretation of knowledge and notice. (1) A person has "knowledge" of a fact within the meaning of this act not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances show bad faith.
- (2) A person has "notice" of a fact within the meaning of this act when the person who claims the benefit of the notice:
 - (a) States the fact to such person, or
- (b) Delivers through the mail, or by other means of communication, a written statement of the fact to such person or to a proper person at his place of business or residence.

History: En. Sec. 3, Ch. 251, L. 1947.

- 63-104. Rules of construction. (1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act.
 - (2) The law of estoppel shall apply under this act.
 - (3) The law of agency shall apply under this act.
- (4) This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.
- (5) This act shall not be construed so as to impair the obligations of any contract existing when the act goes into effect, nor to affect any action or proceedings begun or right accrued before this act takes effect.

History: En. Sec. 4, Ch. 251, L. 1947.

Operation and Effect

The question of whether the defendant was a member of a firm was for the jury to decide and there was ample evidence to sustain a judgment against the defendant when the facts showed that he was one of the furnishers of the working capital of the firm, that he countersigned checks for the firm, and that the other members of the firm told the plaintiff that he was a partner. Gustafson v. Taber, 125 M 225, 234 P 2d 471, 473.

63-105. Rules for cases not provided for in this act. In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.

History: En. Sec. 5, Ch. 251, L. 1947.

- **63-106.** Partnership defined. (1) A partnership is an association of two (2) or more persons to carry on as co-owners a business for profit.
- (2) But any association formed under any other statute of this state, or any statute adopted by authority, other than the authority of this state, is not a partnership under this act, unless such association would have been a partnership in this state prior to the adoption of this act; but this act

shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

History: En. Sec. 6, Ch. 251, L. 1947.

Collateral References
Partnership©1.
68 C.J.S. Partnership § 2.

- 63-107. Rules for determining the existence of a partnership. In determining whether a partnership exists, these rules shall apply:
- (1) Except as provided by section 63-208 persons who are not partners as to each other are not partners as to third persons.
- (2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.
- (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.
- (4) The receipt by a person of a share of the profits of a business is prima-facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:
 - (a) As a debt by installments or otherwise,
 - (b) As wages of an employee or rent to a landlord,
 - (c) As an annuity to a widow or representative of a deceased partner,
- (d) As interest on a loan, though the amount of payment vary with the profits of the business,
- (e) As the consideration for the sale of a good will of a business or other property by installments or otherwise.

History: En. Sec. 7, Ch. 251, L. 1947.

Collateral References

Partnership 5. 68 C.J.S. Partnership \$ 14.

Lease or tenancy agreement as creating partnership relationship between lessor and lessee. 131 ALR 508.

Partnership as distinguished from employment. 137 ALR 6.

What creates partnership relation between cotenants of property. 150 ALR 1003.

Meaning and coverage of "book value" in partnership agreement in determining value of partner's interest. 47 ALR 2d 1425.

Mining grubstake agreements distinguished from partnerships. 70 ALR 2d 907.

- 63-108. Partnership property. (1) All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property.
- (2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.
- (3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.
- (4) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears.

History: En. Sec. 8, Ch. 251, L. 1947.

Cross-Reference

Assessment of property for taxation, sec. 84-419.

Collateral References

Partnership 67. 68 C.J.S. Partnership § 69.

Partnership land as real or personal property for purposes of descent and distribution. 25 ALR 389.

Partition of partnership real property.

77 ALR 300.

Lessee interest of individual as becoming partnership asset of firm subsequently formed. 37 ALR 2d 1076.

When real estate owned by partner before formation of partnership will be deemed to have become assets of the firm. 45 ALR 2d 1009.

CHAPTER 2

PARTNERSHIP IN GENERAL—RELATION OF PARTNERS TO PERSONS DEALING WITH THE PARTNERSHIP

Section 63-201. Partner agent of partnership as to partnership business.

Conveyance of real property of the partnership. 63-202,

63-203. Partnership bound by admission of partner.

63-204. Partnership charged with knowledge of or notice to partner.

63-205. Partnership bound by partner's wrongful act. Partnership bound by partner's breach of trust. Nature of partner's liability. 63-206.

63-207.

63-208. Partner by estoppel.

63-209. Liability of incoming partner.

- 63-201. Partner agent of partnership as to partnership business. (1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.
- An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.
- Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:
- Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership,
 - Dispose of the good will of the business,
- Do any other act which would make it impossible to carry on the ordinary business of a partnership,
 - (d) Confess a judgment,
 - (e) Submit a partnership claim or liability to arbitration or reference.
- No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction.

History: En. Sec. 9, Ch. 251, L. 1947.

Cross-References

Attachment of partnership property, release, sec. 93-4336.

Execution against partnership, sec. 93-

Suits against partnerships, sec. 93-2827.

Business of Partnership

The sale of all the property of a partnership is not the carrying on in the usual way of the business of a partnership within the meaning of this section. Ditzel v. Kent, 131 M 129, 308 P 2d 628, 632,

Sale of Partnership Property

Where real estate broker, when dealing with members of a partnership, knew that one of the partners did not have authority to bind the other partners, he could not bring an action for breach of contract for payment of the commission when the only signer to the contract was one of the partners. Ditzel v. Kent, 131 M 129, 308 P 2d 628, 632.

Collateral References

Partnership = 125. 68 C.J.S. Partnership §135.

Personal liability to other party to contract of member of firm who, without authority, attempts to bind the firm. 4 ALR

Power of partner to dispose of good will

of business. 5 ALR 1182.

Authority of member of farming partnership to execute negotiable paper. ALR 372.

Power of partner to bind firm by bonus

agreement. 49 ALR 1315.
Discharge or settlement by, or payment to, one partner as affecting rights of others. 142 ALR 371.

Agency conferred upon partner as affected by dissolution of the partnership. 170 ALR 512.

Powers and duties of managing partner of mining partnership. 24 ALR 2d 1359.

- 63-202. Conveyance of real property of the partnership. (1) Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of paragraph (1) of section 63-201 or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.
- Where title to real property is in the name of the partnership, a conveyance executed by a partner, in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 63-201.
- Where title to real property is in the name of one or more but not all the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property if the partner's act does not bind the partnership under the provisions of paragraph (1) of section 63-201, unless the purchaser or his assignee, is a holder for value, without knowledge.
- Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 63-201.
- Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property.

History: En. Sec. 10, Ch. 251, L. 1947.

Cross-Reference

Fraudulent conveyance of property, sec.

Knowledge of Lack of Authority to Bind Partnership

Subdivision 4 of this section has no application where real estate broker, in attempting to enforce a contract for the payment of a commission which contract was signed by only one partner, knew that the one partner did not have authority to bind the partnership. Ditzel v. Kent, 131 M 129, 308 P 2d 628, 632.

Collateral References

Partnership = 138. 68 C.J.S. Partnership § 135. Personal liability to other party on contract of partner who, without authority, attempts to convey land in firm name. 4 ALR 261.

Who must sign and form of signature, in case of partnership, in order to comply with statute of frauds. 114 ALR 1005.

63-203. Partnership bound by admission of partner. An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this act is evidence against the partnership.

History: En. Sec. 11, Ch. 251, L. 1947.

Cross-Reference

Declarations of partner as evidence, sec. 93-401-27.

Collateral References

Partnership € 152. 68 C.J.S. Partnership § 167.

Admissions of partner as to past transactions or events as evidence against firm or other partners. 73 ALR 447.

63-204. Partnership charged with knowledge of or notice to partner. Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

History: En. Sec. 12, Ch. 251, L. 1947.

Collateral References

Partnership € 159. 68 C.J.S. Partnership § 175.

63-205. Partnership bound by partner's wrongful act. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

History: En. Sec. 13, Ch. 251, L. 1947.

Collateral References

Partnership \$\sim 153. 68 C.J.S. Partnership \ 168.

Liability for injury by automobile owned by partnership while being used by partner for his own pleasure or business. 22 ALR 1402; 45 ALR 481; 68 ALR 1054; 80 ALR 727 and 122 ALR 862.

Liability for negligence of intoxicated partner. 55 ALR 1225.

Liability of partner for failure to per-

form personal sevices. 165 ALR 981. Liability for assault by partner. 30 ALR 2d 859.

63-206. Partnership bound by partner's breach of trust. The partnership is bound to make good the loss:

(a) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(b) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership.

History: En. Sec. 14, Ch. 251, L. 1947.

63-207. Nature of partner's liability. All partners are liable:

(a) Jointly and severally for everything chargeable to the partnership under sections 63-205 and 63-206.

(b) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.

History: En. Sec. 15, Ch. 251, L. 1947.

Collateral References

Partnership \$\infty\$165. 68 C.J.S. Partnership § 179.

Discharge or settlement by, or payment

to, one partner or co-obligee as affecting rights of others. 142 ALR 371.

Liability of partner for failure to perform personal services. 165 ALR 981. Liability of partners in tort as joint and several. 175 ALR 1310.

- 63-208. Partner by estoppel. (1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made:
- (a) When a partnership liability results, he is liable as though he were an actual member of the partnership.
- When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.
- (2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.

History: En. Sec. 16, Ch. 251, L. 1947.

Operation and Effect

Under the facts in the case the plaintiff had a right to trust to appearances, when it was shown that the defendant furnished the working capital of the firm, that he countersigned checks of the firm, that the other members of the firm had said he was a partner, and that the defendant himself did not inform the plaintiff otherwise. Therefore he can be liable as if he were a partner, and it is a question for the jury to determine. Gustafson v. Taber, 125 M 225, 234 P 2d 471, 473.

Collateral References

Partnership 34. 68 C.J.S. Partnership § 31.

63-209. Liability of incoming partner. A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property.

History: En. Sec. 17, Ch. 251, L. 1947.

Collateral References

Liability of incoming partner for existing debts. 45 ALR 1240.

CHAPTER 3

PARTNERSHIP IN GENERAL—RELATION OF PARTNERS TO ONE ANOTHER

Section 63-301. Rules determining rights and duties of partners.

63-302. Partnership books.

Duty of partners to render information. 63-303.

63-304. Partner accountable as a fiduciary.

63-305. Right to an account. Continuation of partnership beyond fixed term.

- 63-301. Rules determining rights and duties of partners. The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:
- Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.
- The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.
- (c) A partner, who in aid of the partnership, makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance.
- A partner shall receive interest on the capital contributed by him only from the date when repayment should be made.
- All partners have equal rights in the management and conduct of the partnership business.
- No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.
- No person can become a member of a partnership without the consent of all the partners.
- Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners.

History: En. Sec. 18, Ch. 251, L. 1947.

In General

Where a partnership agreement provided that upon the completion of the project the partnership would terminate and the assets and dividends would be divided equally; three of the partners had no right to \$8,500 paid to the other two partners which amount was a part of the renegotiation cost for excess profits of \$35,000. The \$8,500 was paid to the two partners and deducted from the total renegotiation cost of \$35,000 in order to secure to these two partners tax benefits which they would

not be able to obtain as a refund, while the other three partners could claim as a refund their tax benefits after payment of the \$26,500 to the federal government. Pappin v. Dudley, 125 M 248, 236 P 2d

References

Hansen v. Hansen, 130 M 175, 297 P 2d 879, 883.

Collateral References

Partnership 70. 68 C.J.S. Partnership § 76.

Right of partners inter se in respect of interest. 66 ALR 3.

Right of partner or member of joint adventure to share in misappropriated money or property, or secret profits, for which he is required to account. 118 ALR 640.

Provision of partnership agreement giving one partner option to buy out the

other. 160 ALR 523.

Liability of partner for failure to perform personal services. 165 ALR 981.

Liability for assault by partner. 30 ALR

2d 859.

Right of partner to account where firm

business or transactions are illegal. 32 ALR 2d 1345.

Lessee interest of individual as becoming partnership asset of firm subsequently formed. 37 ALR 2d 1076.

Meaning and coverage of "book value" in partnership agreement in determining value of partner's interest. 47 ALR 2d

Construction and application of Uniform Partnership Act, § 18(f), as to surviving partner's right to compensation for services in winding up partnership. 81 ALR 2d 445.

63-302. Partnership books. The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.

History: En. Sec. 19, Ch. 251, L. 1947.

Collateral References

Partnership \$\sim 80. 68 C.J.S. Partnership 8 91.

63-303. Duty of partners to render information. Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability.

History: En. Sec. 20, Ch. 251, L. 1947.

- 63-304. Partner accountable as a fiduciary. (1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.
- This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner.

History: En. Sec. 21, Ch. 251, L. 1947.

Operation and Effect

Where a partner assumes the responsibility of management and operation of a partnership business, and takes over the accounts, books and bank accounts thereof, he acts as trustee for the partnership and his books and accounts of the partnership must be full, true and exact, and he cannot defeat the rights of his copartner to a true settlement and a proper distribution of the assets by failing to keep full and complete accounts. Hansen v. Hansen, 130 M 175, 297 P 2d 879, 881.

Collateral References

Right of partner or member of joint adventure to share in misappropriated money or property, or secret profits, for which he is required to account. 118 ALR 640.

Duty in respect of good faith and disclosure of information upon sale of member's interest in a partnership adventure to other member. 120 ALR 724.

Duty of one who joins with others as partners or members of a joint adventure in the purchase of property from a third person to share with them the benefit of an existing option or executory contract

for the property. 152 ALR 1001.

Duty of former partner, acquiring property occupied by partnership business, to renew lease. 4 ALR 2d 102.

Accounting responsibility of managing partner of mining partnership. 24 ALR 2d 1372.

Right to an account. Any partner shall have the right to a formal account as to partnership affairs:

- (a) If he is wrongfully excluded from the partnership business or possession of its property by his copartners,
 - If the right exists under the terms of any agreement,
 - As provided by section 63-304. (c)
 - (d) Whenever other circumstances render it just and reasonable.

History: En. Sec. 22, Ch. 251, L. 1947.

Collateral References

Partnership \$\sim 81. 68 C.J.S. Partnership 8 92.

Bankrupt or insolvent partner, or his assignee or trustee, as entitled to accounting from solvent partner. 29 ALR 46.

Accountability of partners for profits earned subsequent to death or dissolution. 80 ALR 12 and 55 ALR 2d 1391.

Right of partner to accounting where firm business or transactions are illegal. 32 ALR 2d 1345.

Accounting as remedy with respect to rights in profits earned by partnership after death or dissolution. 55 ALR 2d 1426.

- Continuation of partnership beyond fixed term. (1) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.
- A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima-facie evidence of a continuation of the partnership.

History: En. Sec. 23, Ch. 251, L. 1947.

Collateral References Partnership \$\infty 60. 68 C.J.S. Partnership § 64.

CHAPTER 4

GENERAL PARTNERSHIP—PROPERTY RIGHTS OF A PARTNER

Section 63-401.

Extent of property rights of a partner. Nature of partner's right in specific partnership property. Nature of partner's interest in the partnership. 63-402.

63-403.

Assignment of partner's interest.

Partner's interest subject to charging order.

Extent of property rights of a partner. The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management.

History: En. Sec. 24, Ch. 251, L. 1947.

Collateral References Partnership 70.

68 C.J.S. Partnership § 76.

- 63-402. Nature of a partner's right in specific partnership property.
- A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.
 - The incidents of this tenancy are such that:
- A partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

- (b) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.
- (c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.
- (d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.
- (e) A partner's right in specific partnership property is not subject to dower, courtesy, or allowances to widows, heirs, or next of kin.

History: En. Sec. 25, Ch. 251, L. 1947.

References

Hansen v. Hansen, 130 M 175, 297 P 2d 879, 884.

Collateral References

Partnership ₹ 76. 68 C.J.S. Partnership § 85.

Indebtedness to partnership as subject of attachment or garnishment by creditor of individual partner. 71 ALR 77.

Partition of partnership real property. 77 ALR 300.

Power of surviving partner or member of a joint adventure to grant or sell oil and gas lease or other mineral rights covering land belonging to partnership or joint adventure. 89 ALR 588.

Construction, application, and effect of

Construction, application, and effect of Uniform Partnership Act, § 25(2)(b), relating to nonassignability of partner's right in specific partnership property. 39 ALR 2d 1365.

63-403. Nature of partner's interest in the partnership. A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.

History: En. Sec. 26, Ch. 251, L. 1947.

Collateral References

Right of other partners or partnership creditors in respect of insurance on in-

terest of one of the partners. 61 ALR 1201.

Effect of Uniform Partnership Act, § 26, as converting realty into personalty. 80 ALR 2d 1107.

- 63-404. Assignment of partner's interest. (1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.
- (2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners.

History: En. Sec. 27, Ch. 251, L. 1947.

Collateral References
Partnership©=226.
68 C.J.S. Partnership § 244.

Rights of creditors where partnership business is continued without liquidation upon retirement or death of partners, under provisions of Uniform Partnership Act. 111 ALR 1093. Provision of partnership agreement giving one partner option to buy out the other. $160~\mathrm{ALR}~523.$

- 63-405. Partner's interest subject to charging order. (1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.
- (2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:
 - (a) With separate property, by any one or more of the partners, or
- (b) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.
- (3) Nothing in this act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership.

History: En. Sec. 28, Ch. 251, L. 1947.

Collateral References

Partnership \$\sim 208. 68 C.J.S. Partnership §§ 216, 217.

CHAPTER 5

GENERAL PARTNERSHIP—DISSOLUTION AND WINDING UP

Section 63-501. Dissolution defined.

63-502. Partnership not terminated by dissolution.

63-503. Causes of dissolution.

63-504. Dissolution by decree of court.

63-505. General effect of dissolution on authority of partner.

63-506. Right of partner to contribution from copartners after dissolution.

63-507. Power of partner to bind partnership to third persons after dissolution.

63-508. Effect of dissolution on partner's existing liability.

63-509. Right to wind up.

63-510. Rights of partners to application of partnership property.

63-511. Rights where partnership is dissolved for fraud or misrepresentation.

63-512. Rules for distribution.

63-513. Liability of persons continuing the business in certain cases.

63-514. Rights of retiring or estate of deceased partner when the business is continued.

63-515. Accrual of actions.

63-501. Dissolution defined. The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

History: En. Sec. 29, Ch. 251, L. 1947.

Cross-Reference

Receiver, appointment, sec. 93-4401.

Collateral References

Partnership = 252, 262, 68 C.J.S. Partnership § 330.

Appointment of receiver in proceedings arising out of dissolution of partnership, otherwise than at instance of creditor, where partner or partnership insolvent. 23 ALR 2d 640. Rights in profits earned by partnership or joint adventure after death or dissolution. 55 ALR 2d 1391.

Good will as passing by implication up-on transfer of withdrawing partners' interest to remaining members of fund. 65 ALR 2d 508.

Sale or transfer of interest by partner as dissolving partnership. 75 ALR 2d 1036.

63-502. Partnership not terminated by dissolution. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

History: En. Sec. 30, Ch. 251, L. 1947.

Collateral References

Rights in profits earned by partnership or joint adventure after death or dissolution, 55 ALR 2d 1391.

Rights as to business unfinished or fees uncollected upon withdrawal or death of partner in law firm. 78 ALR 2d 280.

Causes of dissolution. Dissolution is caused: 63-503.

- Without violation of the agreement between the partners:
- By the termination of the definite term or particular undertaking specified in the agreement,
- By the express will of any partner when no definite term or particular undertaking is specified,
- By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking,
- By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners:
- (2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;
- By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;
 - By the death of any partner; (4)
 - By the bankruptcy of any partner or the partnership;
 - By decree of court under section 63-504.

History: En. Sec. 31, Ch. 251, L. 1947.

References

McNaught v. Weyh, 128 M 418, 276 P 2d 491, 495; Hansen v. Hansen, 130 M 175, 297 P 2d 879, 883.

Collateral References

Bankruptcy or insolvency of individual partner as dissolving copartnership. 29 ALR 45.

Agreement for dissolution as affecting partner's lien on or interest in assets of partnership. 43 ALR 95.
Agreement for disposition of interest in

partnership in event of death of partner. 73 ALR 983.

Provision for disposition of partner's interest on death of partner as affecting validity of contract. 1 ALR 2d 1265. Sale or transfer of interest by partner as

dissolving partnership. 75 ALR 2d 1036.

- **63-504.** Dissolution by decree of court. (1) On application by or for a partner the court shall decree a dissolution whenever:
- (a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,
- (b) A partner becomes in any other way incapable of performing his part of the partnership contract,
- (c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,
- (d) A partner willfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him.
 - (e) The business of the partnership can only be carried on at a loss,
 - (f) Other circumstances render a dissolution equitable.
- (2). On the application of the purchaser of a partner's interest under sections 63-404 or 63-405:
- (a) After the termination of the specified term or particular undertaking,
- (b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

History: En. Sec. 32, Ch. 251, L. 1947.

Right to Possession of Property after Dissolution

In an action in claim and delivery brought by a partner against a third party and involving partnership property acquired by the third person after dissolution of the partnership by the express will of the partners, allegations of the existence of the partnership, of the subsequent dissolution, and that the defendant wrong-

fully took possession of the property were sufficient to show right to possession and to state a cause of action. Rykken v. Black, 136 M 464, 348 P 2d 998.

Collateral References

Partnership € 313. 68 C.J.S. Partnership § 405.

Misconduct of, or dissension among partners or joint adventurers as ground for dissolution by court. 118 ALR 1421.

- 63-505. General effect of dissolution on authority of partner. Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership,
 - (1) With respect to the partners,
- (a) When the dissolution is not by the act, bankruptcy or death of a partner; or
- (b) When the dissolution is by such act, bankruptcy or death of a partner, in cases where section 63-506 so requires.
 - (2) With respect to persons not partners, as declared in section 63-507.

History: En. Sec. 33, Ch. 251, L. 1947.

Collateral References

Partnership 278.

68 C.J.S. Partnership § 354.

Nonuse of trade name as affecting rights of partners inter se after dissolution of firm. 48 ALR 1263.

Service of process on single partner in

action against partnership or partners after dissolution of partnership but before partnership affairs have been wound up. 136 ALR 1071.

up. 136 ALR 1071.

Agency conferred upon partner as affected by dissolution of partnership. 170

Powers of liquidating partner with respect to incurring obligations, 60 ALR 2d 826.

- 63-506. Right of partner to contribution from copartners after dissolution. Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his copartners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless:
- (a) The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or
- (b) The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy.

History: En. Sec. 34, Ch. 251, L. 1947.

- 63-507. Power of partner to bind partnership to third persons after dissolution. (1) After dissolution a partner can bind the partnership except as provided in paragraph (3)
- (a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;
- (b) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction:
- (I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or
- (II) Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.
- (2) The liability of a partner under paragraph (1b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution:
- (a) Unknown as a partner to the person with whom the contract is made: and
- (b) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.
- (3) The partnership is in no case bound by any act of a partner after dissolution:
- (a) Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or
 - (b) Where the partner has become bankrupt; or
- (c) Where the partner has no authority to wind up partnership affairs; except by a transaction with one who:
- (I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or
- (II) Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in paragraph (1b-II).

(4) Nothing in this section shall affect the liability under section 63-208 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business.

History: En. Sec. 35, Ch. 251, L. 1947.

Collateral References

Agency conferred upon partners as

affected by dissolution of the partnership. 170 ALR 512.

Power of liquidating partner with respect to incurring of obligations. 60 ALR 2d 826

- **63-508.** Effect of dissolution on partner's existing liability. (1) The dissolution of the partnership does not of itself discharge the existing liability of any partner.
- (2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.
- (3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.
- (4) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts.

History: En. Sec. 36, Ch. 251, L. 1947.

Collateral References

Right of partnership creditor to proceed against estate of deceased partner. 61 ALR 1410

63-509. Right to wind up. Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative or his assignee, upon cause shown, may obtain winding up by the court.

History: En. Sec. 37, Ch. 251, L. 1947.

Right to Possession of Property after Dissolution

In an action in claim and delivery brought by a partner against a third party and involving partnership property acquired by the third person after dissolution of the partnership by the express will of the partners, allegations of the existence of the partnership, of the subsequent dissolution, and that the defendant wrongfully took possession of the property were sufficient to show right to possession and to state a cause of action. Rykken v. Black, 136 M 464, 348 P 2d 998.

63-510. Rights of partners to application of partnership property. (1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner as against his copartners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net

amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under section 63-508(2), he shall receive in cash only the net amount due him from the partnership.

- (2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:
- (a) Each partner who has not caused dissolution wrongfully shall have:
 - (I) All the rights specified in paragraph (1) of this section, and
- (II) The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.
- (b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2a-II) of the section, and in like manner indemnify him against all present or future partnership liabilities.
 - (c) A partner who has caused the dissolution wrongfully shall have:
- (I) If the business is not continued under the provisions of paragraph (2b) all the rights of a partner under paragraph (1), subject to clause (2a-II), of this section,
- (II) If the business is continued under paragraph (2b) of this section the right as against his copartners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertained and paid him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good will of the business shall not be considered.

History: En. Sec. 38, Ch. 251, L. 1947.

- 63-511. Rights where partnership is dissolved for fraud or misrepresentation. Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled:
- (a) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and
- (b) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect to the partnership liabilities; and
- (c) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership.

History: En. Sec. 39, Ch. 251, L. 1947.

- 63-512. Rules for distribution. In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:
 - (a) The assets of the partnership are:
 - (I) The partnership property,
- (II) The contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this paragraph.
- (b) The liabilities of the partnership shall rank in order of payment, as follows:
 - (I) Those owing to creditors other than partners,
 - (II) Those owing to partners other than for capital and profits,
 - (III) Those owing to partners in respect of capital,
 - (IV) Those owing to partners in respect of profits.
- (c) The assets shall be applied in the order of their declaration in clause (a) of this paragraph to the satisfaction of the liabilities.
- (d) The partners shall contribute, as provided by section 63-301(a) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits the additional amount necessary to pay the liabilities.
- (e) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in clause (d) of this paragraph.
- (f) Any partner or his legal representative shall have the right to enforce the contributions specified in clause (d) of this paragraph, to the extent of the amount which he has paid in excess of his share of the liability.
- (g) The individual property of a deceased partner shall be liable for the contributions specified in clause (d) of this paragraph.
- (h) When partnership property and the individual properties of the partners are in possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.
- (i) Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order:
 - (I) Those owing to separate creditors,
 - (II) Those owing to partnership creditors,
 - (III) Those owing to partners by way of contribution.

History: En. Sec. 40, Ch. 251, L. 1947.

Collateral References

Right of partner to preference over creditors of copartner. $6~\mathrm{ALR}~160.$

Equalization as between firm creditors, some of whom have received dividends from estates of individual partners and others not. 7 ALR 990.

Relative rank of judgment, attachment, or execution based upon partnership liability and judgment, attachment, or execution based on liability of individual partner. 75 ALR 997.

Rights in profits earned by partnership or joint adventure after death or dissolu-

tion. 55 ALR 2d 1391.

63-513. Liability of persons continuing the business in certain cases.

(1) When any new partner is admitted into an existing partnership, or

when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

- (2) When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.
- (3) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in paragraphs (1) and (2) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.
- (4) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.
- (5) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of section 63-510(2b), either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.
- (6) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.
- (7) The liability of a third person becoming a partner in the partnership continuing the business, under this section, to the creditors of the dissolved partnership shall be satisfied out of partnership property only.
- (8) When the business of a partnership after dissolution is continued under any conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business, on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.
- (9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership.

History: En. Sec. 41, Ch. 251, L. 1947.

Partnership Accounting

Where no balance of the partnership business could be arrived at without accounting, the defendant made all his records available and had thought there was a loss instead of a profit, and the plaintiff's demand was more than the final accounting showed, interest on the amount due was figured from the date of the judgment rather than the date of the termination of the partnership. Shidu v. Hollenback, 133 M 265, 322 P 2d 325, 329.

Collateral References

Incoming partner's liability for existing debts, 45 ALR 1240.

63-514. Rights of retiring or estate of deceased partner when the business is continued. When any partner retires or dies, and the business is continued under any of the conditions set forth in section 63-513 (1, 2, 3, 5, 6), or section 63-510(2b), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by section 63-513(8).

History: En. Sec. 42, Ch. 251, L. 1947.

Cross-References

Estates, sale of partnership interest, sec. 91-2808.

Surviving partner, settling business, sec. 91-3205.

Partnership Accounting

Where the circumstances were such that no balance of the partnership business could be arrived at without the accounting asked for by the plaintiff, interest on the amount due from the defendant was figured from the date of the judgment rather than the date of the termination of the partnership. Shidu v. Hollenback, 133 M 265, 322 P 2d 325, 329.

Collateral References

Validity, construction, and effect of

agreement for disposition of interest in partnership in event of death of partner. 73 ALR 983.

Accountability of partner or joint adventurer for profits earned subsequently to death or dissolution. 80 ALR 12 and 55 ALR 2d 1391.

Duty of surviving partner or partners toward estate of deceased partner upon purchase of latter's interest. 80 ALR 1034 and 120 ALR 740.

Rights of creditors where partnership business is continued without liquidation after retirement or death of partner, under provisions of Uniform Partnership Act. 111 ALR 1093.

Construction and application of § 42 of Uniform Partnership Act as to rights of parties where business is continued after a partner retires or dies. 2 ALR 2d 1084.

63-515. Accrual of actions. The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary.

History: En. Sec. 43, Ch. 251, L. 1947.

Collateral References

Right of partner accountable for profits

earned subsequently to dissolution to compensation for services by way of setoff against former partner. 55 ALR 2d 1423.

Actions between partners with respect to agreement relating to salary of partner. 66 ALR 2d 1041.

CHAPTER 6

PARTNERSHIP-USE OF FICTITIOUS NAME

Section 63-601. Fictitious name.

63-602. Certificate—when to be filed.

63-603. Change of membership—filing new certificate.

63-604 Register of such firms to be kept by county clerk.

Certified copies of register, and proof of publication, to be evidence. Individual using fictitious name in business must file certificate.

63-601. (8019) Fictitious name. Every partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the county in which its principal place of business is situated, a certificate, stating the names in full of all the members of such partnership and their places of residence, and publish the same once a week, for four successive weeks, in a newspaper published in the county, if there be one, and if there be none in such county, then in a newspaper published in an adjoining county.

History: En. Sec. 3280, Civ. C. 1895; re-en. Sec. 5504, Rev. C. 1907; re-en. Sec. 8019, R. C. M. 1921. Cal. Civ. C. Sec. 2466.

Application of Law

This section and section 63-602 apply only to persons doing business under fictitious names or titles not revealing the names of the persons interested in the business. Lander v. Sheehan, 32 M 25, 28, 79 P 406. See Vaughan v. Kujath, 44 M 484, 487, 120 P 1121.

Firm Name

Where plaintiffs, A. Guiterman, S. A. Guiterman, and L. A. Guiterman, were doing business under the firm name of Guiterman Bros., the same was neither fictitious nor a designation not showing the names of the partners, within the purview of this section. Guiterman v. Wishon, 21 M 458, 464, 54 P 566.

The name "McLaughlin Bros." does not come within this section; it cannot be said, as a matter of law, that such name is a designation not showing the names of the persons interested as partners. Vaughan v. Kujath, 44 M 484, 486, 120 P 1121.

Maintenance of Action

It is not the right to begin an action, but the right to maintain it, that is withheld by the statute for failure to comply with its terms; and if, before the defense is interposed, the plaintiff complies with the statutory provisions, the action may be maintained. The defense is an affirm-ative one, and is waived unless pleaded in the answer. Reilly v. Hatheway, 46 M 1, 11, 125 P 417.

References

Wilson v. Yegen Bros., 38 M 504, 506, 100 P 613; Croft v. Bain. 49 M 484, 486, 143 P 960; Canonica v. St. George, 64 M 200, 204, 208 P 607; Gardiner v. Eclipse Grocery Co., 72 M 540, 548, 234 P 490.

Collateral References

Partnership \$\infty\$64, 228. 68 C.J.S. Partnership § 66. 40 Am. Jur. 132, Partnership, § 10.

Rights in firm name upon sale or dissolu-

tion, under statutes as to doing business under an assumed or fictitious name or designation not showing the names of the persons interested. 42 ALR 2d 541.

63-602. (8020) Certificate—when to be filed. The certificate filed with the clerk, as provided in the preceding section, must be signed by the partners, and acknowledged before some officer authorized to take acknowledgment of conveyances of real property. Where the partnership is hereafter formed, the certificate must be filed and the publication designated in that section must be made within one month after the formation of the

partnership, or within one month from the time designated in the agreement of its members for the commencement of the partnership; where the partnership has been heretofore formed, the certificate must be filed and the publication made within six months after the passage of this code. Persons doing business as partners contrary to the provisions of this chapter, or any assigns thereof, shall not maintain any action upon or on account of any contracts made or transactions had in their partnership name, in any court of this state, until they have first filed the certificate and made the publication herein required.

History: En. Sec. 3281, Civ. C. 1895; re-en. Sec. 5505, Rev. C. 1907; re-en. Sec. 8020, R. C. M. 1921. Cal. Civ. C. Sec. 2468.

Application of Law

The disability imposed by this section for a failure to comply with section 63-601 cannot avail a defendant, sued by the copartners conducting a business under a fletitious name, except upon affirmative allegation and proof; it is in the nature of matter in abatement; the inhibition does not destroy the right of action upon which recovery is sought, but merely imposes a disability to maintain the action until there has been a compliance with section 63-601. Croft v. Bain, 49 M 484, 489, 143 P 960.

Maintenance of Action

Suit involving a partnership claim may be instituted in the name of the persons composing the partnership, where the fact that plaintiffs are copartners does not appear from the face of the complaint and is not raised by answer, and the objection to the right to maintain suit being deemed waived, it is not error to exclude evidence showing the certificate has been filed. Wilson v. Yegen Bros., 38 M 504, 509, 100 P 613.

References

Lander v. Sheehan, 32 M 25, 28, 79 P 406; Vaughan v. Kujath, 44 M 484, 485, 120 P 1121; Canonica v. St. George, 64 M 200, 204, 208 P 607; Gardiner v. Eclipse Grocery Co., 72 M 540, 548, 234 P 490; Arnold v. Genzberger, 96 M 358, 31 P 2d 296.

63-603. (8021) Change of membership—filing new certificate. On every change of the members of a partnership transacting business in this state under a fictitious name, or a designation which does not show the names of the persons interested as partners in its business, a new certificate must be filed with the county clerk, and a new publication made, as required by this chapter, on the formation of such partnership.

History: En. Sec. 3282, Civ. C. 1895; re-en. Sec. 5506, Rev. C. 1907; re-en. Sec. 8021, R. C. M. 1921. Cal. Civ. C. Sec. 2469.

63-604. (8022) Register of such firms to be kept by county clerk. Every county clerk must keep a register of the names of firms and persons mentioned in the certificates filed with him, pursuant to this chapter, entering in alphabetical order the name of every such partnership, and of each partner therein.

History: En. Sec. 3283, Civ. C. 1895; 8022, R. C. M. 1921. Cal. Civ. C. Sec. 2470. re-en. Sec. 5507, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1326.

63-605. (8023) Certified copies of register, and proof of publication, to be evidence. Copies of the entries of a county clerk, as herein directed, when certified by him, and affidavits of publication, as herein directed, made by the printer, publisher, or chief clerk of a newspaper, are presumptive evidence of the facts therein stated.

History: En. Sec. 3284, Civ. C. 1895; re-en. Sec. 5508, Rev. C. 1907; re-en. Sec. 8023, R. C. M. 1921. Cal. Civ. C. Sec. 2471. Field Civ. C. Sec. 1327.

Collateral References

Evidence 383(3).

32 C.J.S. Evidence §§ 688, 765, 766, 772, 773.

63-606. (8024) Individual using fictitious name in business must file certificate. Every individual now transacting business, or who may hereafter transact business, in this state under a fictitious name, or a style or designation purporting to be a firm name or corporate name, shall file and publish, or cause to be filed and published, the certificates described in sections 63-601, 63-602 and 63-603. Any one doing business contrary to the provisions of this section shall be subject to the disabilities and provisions of section 63-602.

History: En. Sec. 3285, Civ. C. 1895; re-en. Sec. 5509, Rev. C. 1907; re-en. Sec. 8024, R. C. M. 1921.

Certificate, Filing Required

If the name under which a business is transacted fairly discloses the true name of the individual (or of each partner in case of a partnership), the statute (this section) requiring the filing of a certificate disclosing the true name (or names) does not apply; otherwise the name used is fictitious and the requirement must be met. Canonica v. St. George, 64 M 200, 204, 208 P 607.

Failure to File Certificate

Failure of one doing business under a fictitious name to file the certificate showing his true name does not invalidate the contract or other transaction sued on by him or destroy his right of action, but operates only upon the remedy and then only until the requirements of the statute have been met. Canonica v. St. George, 64 M 200, 204, 208 P 607.

In an action to recover on a contract or obligation by one doing business under a fictitious name, an allegation that he has complied with the statute covering the subject is not a part of the statement of his cause of action, his failure in that regard being a matter of defense which must be specially pleaded, else it is waived. Canonica v. St. George, 64 M 200, 204, 208 P 607.

Where plaintiff, in an action for work and labor performed, doing business under the fictitious name of "Tony's Tin Shop," in which the special defense that he had not filed the certificate required by this section had been erroneously stricken on motion of plaintiff, had made out a primafacie case and there was not any evidence before the court that he had not complied with the statute, the granting of a nonsuit on the ground that he had not proved compliance with the provisions of the section, was error. Canonica v. St. George, 64 M 200, 204, 208 P 607.

Transacting Business

A person who, in a single isolated instance, signs a contract with a fictitious name, is not "transacting" or "doing" business within the inhibition of this section, and may invoke the aid of a court to enforce his claim. Keffler v. Wilds, 50 M 381, 383, 146 P 1103.

References

Reilly v. Hatheway, 46 M 1, 10, 125 P 417.

Collateral References

Names € 10. 65 C.J.S. Names § 9.

CHAPTER 7

SPECIAL PARTNERSHIP—FORMATION

Section 63-701. Limited partnership defined.

63-702. Formation.

63-703. Business which may be carried on.

63-704. Character of limited partner's contribution.

63-705. A name not to contain surname of limited partner—exceptions.

63-706. Liability for false statements in certificate.

63-701. Limited partnership defined. A limited partnership is a partnership formed by two or more persons under the provisions of section 63-702, having as members one or more general partners and one or

more limited partners. The limited partners as such shall not be bound by the obligations of the partnership.

History: En. Sec. 1, Ch. 252, L. 1947. Earlier acts relating to special partnerships were Secs. 8025 to 8049, R. C. M. 1935

NOTE.—Uniform State Law. Sections 63-701 to 63-911 constitute the "Uniform Limited Partnership Act" approved by the National Conference of Commissioners on Uniform State Laws in 1916 and adopted in the states of Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and also Alaska and Hawaii.

Collateral References

Partnership ≈351 et seq. 68 C.J.S. Partnership § 449. 40 Am. Jur. 474, Partnership, §§ 504 et

Statute requiring "mercantile partnership" to post names of members of firm as applicable to limited partnerships only. 45 ALR 237 and 59 ALR 457.

Liability of special partner who has withdrawn his capital, to creditors of the firm. 67 ALR 1096.

Application to limited partnerships of statute as to doing business under an assumed or fictitious name or designation not showing the names of the persons interested. 42 ALR 2d 544.

- **63-702. Formation.** (1) Two or more persons desiring to form a limited partnership shall
 - (a) Sign and swear to a certificate, which shall state
 - I. The name of the partnership,
 - II. The character of the business,
 - III. The location of the principal place of business,
- IV. The name and place of residence of each member; general and limited partners being respectively designated,
 - V. The term for which the partnership is to exist,
- VI. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner,
- VII. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made,
- VIII. The time, if agreed upon, when the contribution of each limited partner is to be returned,
- IX. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution,
- X. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution,
- XI. The right, if given, of the partners to admit additional limited partners,
- XII. The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority,
- XIII. The right, if given, of the remaining general partner or partners to continue the business on the death, retirement or insanity of a general partner, and
- XIV. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.

- (b) File for record the certificate in the office of the county clerk and recorder.
- (2) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph (1).

History: En. Sec. 2, Ch. 252, L. 1947.

Collateral References
Partnership ← 352.
68 C.J.S. Partnership § 453 et seq.

63-703. Business which may be carried on. A limited partnership may carry on any business which a partnership without limited partners may carry on.

History: En. Sec. 3, Ch. 252, L. 1947.

Collateral References
Partnership \$\infty 351\frac{1}{2}\$.
68 C.J.S. Partnership \\$ 463.

63-704. Character of limited partner's contribution. The contributions of a limited partner may be eash or other property, but not services.

History: En. Sec. 4, Ch. 252, L. 1947.

Collateral References

Partnership \$355. 68 C.J.S. Partnership § 456.

63-705. A name not to contain surname of limited partner—exceptions.

(1) The surname of a limited partner shall not appear in the partnership name, unless

(a) It is also the surname of a general partner, or

(b) Prior to the time when the limited partner became such the business had been carried on under a name in which his surname appeared.

(2) A limited partner whose name appears in a partnership name contrary to the provisions of paragraph (1) is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that he is not a general partner.

History: En. Sec. 5, Ch. 252, L. 1947.

Collateral References
Partnership ≈ 358.
68 C.J.S. Partnership § 462.

- 63-706. Liability for false statements in certificate. If the certificate contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false;
 - (a) At the time he signed the certificate, or
- (b) Subsequently, but within a sufficient time before the statement was relied upon to enable him to cancel or amend the certificate, or to file a petition for its cancellation or amendment as provided in section 63-906(3).

History: En. Sec. 6, Ch. 252, L. 1947.

Collateral References

Partnership € 362. 68 C.J.S. Partnership § 461. Liability for false information in certificate of limited partnership, under Uniform Limited Partnership Act, § 6. 34 ALR 2d 1454.

CHAPTER 8

SPECIAL PARTNERSHIP—POWERS, DUTIES AND LIABILITIES OF PARTNERS

Section 63-801. Limited partner not liable to creditors.
63-802. Admission of additional limited partners.

63-803. Rights, powers and liabilities of a general partner.

63-804. Rights of a limited partner.

Status of person erroneously believing himself a limited partner 63-805.

63-806. One person both general and limited partner.
63-807. Loans and other business transactions with limited partner.
63-808. Relation of limited partners inter se.
63-809. Compensation of limited partner.

63-810. Withdrawal or reduction of limited partner's contribution.

63-811. Liability of limited partner to partnership.
63-812. Nature of limited partner's interest in partnership.
63-813. Assignment of limited partner's interest.

63-801. Limited partner not liable to creditors. A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business.

History: En. Sec. 7, Ch. 252, L. 1947.

Collateral References

Partnership@371. 68 C.J.S. Partnership § 478.

63-802. Admission of additional limited partners. After the formation of a limited partnership, additional limited partners may be admitted upon filing an amendment to the original certificate in accordance with the requirements of section 63-906.

History: En. Sec. 8, Ch. 252, L. 1947.

Collateral References

Partnership 363. 68 C.J.S. Partnership § 474.

- 63-803. Rights, powers and liabilities of a general partner. A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to
 - Do any act in contravention of the certificate,
- Do any act which would make it impossible to carry on the ordinary business of the partnership,

Confess a judgment against the partnership,

Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose,

(e) Admit a person as a general partner,

- Admit a person as a limited partner, unless the right so to do is given in the certificate.
- Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate.

History: En. Sec. 9, Ch. 252, L. 1947.

Collateral References

Partnership 366. 68 C.J.S. Partnership § 470.

- 63-804. Rights of a limited partner. (1) A limited partner shall have the same rights as a general partner to
- Have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them,

- (b) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable, and
 - (c) Have dissolution and winding up by decree of court.
- (2) A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as provided in sections 63-809 and 63-810.

History: En. Sec. 10, Ch. 252, L. 1947.

63-805. Status of person erroneously believing himself a limited partner. A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income.

History: En. Sec. 11, Ch. 252, L. 1947.

Collateral References

Construction and effect of § 11 of the Uniform Limited Partnership Act provid-

ing for modification or limitation of liability upon performance of certain acts by one who erroneously believed he had become a limited partner. 18 ALR 2d 1360.

- 63-806. One person both general and limited partner. (1) A person may be a general partner and a limited partner in the same partnership at the same time.
- (2) A person who is a general, and also at the same time a limited partner, shall have all the rights and powers and be subject to all the restrictions of a general partner; except that, in respect to his contribution, he shall have the rights against the other members which he would have had if he were not also a general partner.

History: En. Sec. 12, Ch. 252, L. 1947.

Collateral References
Partnership €= 366.
68 C.J.S. Partnership § 473.

63-807. Loans and other business transactions with limited partner.

- (1) A limited partner also may loan money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets. No limited partner shall in respect to any such claim
 - (a) Receive or hold as collateral security any partnership property, or
- (b) Receive from a general partner or the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners.
- (2) The receiving of collateral security, or a payment, conveyance, or release in violation of the provisions of paragraph (1) is a fraud on the creditors of the partnership.

History: En. Sec. 13, Ch. 252, L. 1947.

Collateral References
Partnership \$\infty 371.
68 C.J.S. Partnership \(\) 478.

63-808. Relation of limited partners inter se. Where there are several limited partners the members may agree that one or more of the limited partners shall have a priority over other limited partners as to the return of their contributions, as to their compensation by way of income, or as to any other matter. If such an agreement is made it shall be stated in the certificate, and in the absence of such a statement all the limited partners shall stand upon equal footing.

History: En. Sec. 14, Ch. 252, L. 1947.

Collateral References
Partnership ≈ 366.
68 C.J.S. Partnership § 472.

63-809. Compensation of limited partner. A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate; provided, that after such payment is made, whether from the property of the partnership or that of a general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners.

History: En. Sec. 15, Ch. 252, L. 1947.

Collateral References
Partnership 376.
68 C.J.S. Partnership § 488.

- 63-810. Withdrawal or reduction of limited partner's contribution. (1) A limited partner shall not receive from a general partner or out of partnership property any part of his contribution until
- (a) All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them.
- (b) The consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of paragraph (2), and
- (c) The certificate is canceled or so amended as to set forth the withdrawal or reduction.
- (2) Subject to the provisions of paragraph (1) a limited partner may rightfully demand the return of his contribution
 - (a) On the dissolution of a partnership, or
- (b) When the date specified in the certificate for its return has arrived, or
- (c) After he has given six months' notice in writing to all other members, if no time is specified in the certificate either for the return of the contribution or for the dissolution of the partnership.
- (3) In the absence of any statement in the certificate to the contrary or the consent of all members, a limited partner, irrespective of the nature of his contribution, has only the right to demand and receive cash in return for his contribution.
- (4) A limited partner may have the partnership dissolved and its affairs wound up when

- (a) He rightfully but unsuccessfully demands the return of his contribution, or
- (b) The other liabilities of the partnership have not been paid, or the partnership property is insufficient for their payment as required by paragraph (1a) and the limited partner would otherwise be entitled to the return of his contribution.

History: En. Sec. 16, Ch. 252, L. 1947.

Collateral References
Partnership ≈ 376.
68 C.J.S. Partnership § 488.

- 63-811. Liability of limited partner to partnership. (1) A limited partner is liable to the partnership
- (a) For the difference between his contribution as actually made and that stated in the certificate as having been made, and
- (b) For any unpaid contribution which he agreed in the certificate to make in the future at the time and on the conditions stated in the certificate.
 - (2) A limited partner holds as trustee for the partnership
- (a) Specific property stated in the certificate as contributed by him, but which was not contributed or which has been wrongfully returned, and
- (b) Money or other property wrongfully paid or conveyed to him on account of his contribution.
- (3) The liabilities of a limited partner as set forth in this section can be waived or compromised only by the consent of all members; but a waiver or compromise shall not affect the right of a creditor of a partner-ship, who extended credit or whose claim arose after the filing and before a cancellation or amendment of the certificate, to enforce such liabilities.
- (4) When a contributor has rightfully received the return in whole or in part of the capital of his contribution, he is nevertheless liable to the partnership for any sum, not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return.

History: En. Sec. 17, Ch. 252, L. 1947.

63-812. Nature of limited partner's interest in partnership. A limited partner's interest in the partnership is personal property.

History: En. Sec. 18, Ch. 252, L. 1947.

- 63-813. Assignment of limited partner's interest. (1) A limited partner's interest is assignable.
- (2) A substituted limited partner is a person admitted to all the rights of a limited partner who has died or has assigned his interest in a partnership.
- (3) An assignee, who does not become a substituted limited partner, has no right to require any information or account of the partnership transactions or to inspect the partnership books; he is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution, to which his assignor would otherwise be entitled.

- (4) An assignee shall have the right to become a substituted limited partner if all the members (except the assignor) consent thereto or if the assignor, being thereunto empowered by the certificate, gives the assignee that right.
- (5) An assignee becomes a substituted limited partner when the certificate is appropriately amended in accordance with section 63-906.
- (6) The substituted limited partner has all the rights and powers, and is subject to all the restrictions and liabilities of his assignor, except those liabilities of which he was ignorant at the time he became a limited partner and which could not be ascertained from the certificate.
- (7) The substitution of the assignee as a limited partner does not release the assignor from liability to the partnership under sections 63-706 and 63-811.

History: En. Sec. 19, Ch. 252, L. 1947.

Collateral References

Partnership €= 363.

68 C.J.S. Partnership § 474.

CHAPTER 9

SPECIAL PARTNERSHIP—ALTERATION AND DISSOLUTION—CONSTRUCTION OF ACT—EXISTING PARTNERSHIPS

Section 63-901. Effect of retirement, death or insanity of a general partner.

63-902. Death of limited partner.

63-903. Rights of creditors of limited partner.

63-904. Distribution of assets.

63-905. When certificate shall be canceled or amended.

63-906. Requirements for amendment and for cancellation of certificate.

63-907. Parties to actions.

63-908. Name of act.

63-909. Rules of construction.

63-910. Rules for cases not provided for in this act.

63-911. Provisions for existing limited partnerships.

63-901. Effect of retirement, death or insanity of a general partner. The retirement, death or insanity of a general partner dissolves the partnership, unless the business is continued by the remaining general partners

a) Under a right so to do stated in the certificate, or

(b) With the consent of all members.

History: En. Sec. 20, Ch. 252, L. 1947.

Collateral References

Partnership 376.

68 C.J.S. Partnership § 488.

- **63-902.** Death of limited partner. (1) On the death of a limited partner his executor or administrator shall have all the rights of a limited partner for the purpose of settling his estate, and such power as the deceased had to constitute his assignee a substituted limited partner.
- (2) The estate of a deceased limited partner shall be liable for all his liabilities as a limited partner.

History: En. Sec. 21, Ch. 252, L. 1947.

Collateral References

Partnership 363.

68 C.J.S. Partnership § 474.

63-903. Rights of creditors of limited partner. (1) On due application to a court of competent jurisdiction by any creditor of a limited part-

ner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of such claim; and may appoint a receiver, and make all other orders, directions, and inquiries which the circumstances of the case may require.

- (2) The interest may be redeemed with the separate property of any general partner, but may not be redeemed with partnership property.
- (3) The remedies conferred by paragraph (1) shall not be deemed exclusive of others which may exist.
- (4) Nothing in this act shall be held to deprive a limited partner of his statutory exemption.

History: En. Sec. 22, Ch. 252, L. 1947.

Collateral References
Partnership ≈ 371.
68 C.J.S. Partnership § 478.

- **63-904.** Distribution of assets. (1) In settling accounts after dissolution the liabilities of the partnership shall be entitled to payment in the following order:
- (a) Those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contributions, and to general partners,
- (b) Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions,
- (c) Those to limited partners in respect to the capital of their contributions,
 - (d) Those to general partners other than for capital and profits,
 - (e) Those to general partners in respect to profits,
 - (f) Those to general partners in respect to capital.
- (2) Subject to any statement in the certificate or to subsequent agreement, limited partners share in the partnership assets in respect to their claims for capital, and in respect to their claims for profits or for compensation by way of income on their contributions respectively, in proportion to the respective amounts of such claims.

History: En. Sec. 23, Ch. 252, L. 1947.

Collateral References
Partnership 376.
68 C.J.S. Partnership § 489.

- 63-905. When certificate shall be canceled or amended. (1) The certificate shall be canceled when the partnership is dissolved or all limited partners cease to be such.
 - (2) A certificate shall be amended when
- (a) When there is a change in the name of the partnership or in the amount or character of the contribution of any limited partner,
 - (b) A person is substituted as a limited partner,
 - (c) An additional limited partner is admitted,
 - (d) A person is admitted as a general partner,
- (e) A general partner retires, dies or becomes insane, and the business is continued under section 63-901,
- (f) There is a change in the character of the business of the partner-ship,

- (g) There is a false or erroneous statement in the certificate,
- (h) There is a change in the time as stated in the certificate for the dissolution of the partnership or for the return of a contribution,
- (i) A time is fixed for the dissolution of the partnership, or the return of a contribution, no time having been specified in the certificate, or
- (j) The members desire to make a change in any other statement in the certificate in order that it shall accurately represent the agreement between them.

History: En. Sec. 24, Ch. 252, L. 1947.

Collateral References
Partnership € 354.
68 C.J.S. Partnership § 460.

63-906. Requirements for amendment and for cancellation of certificate. (1) The writing to amend a certificate shall

- (a) Conform to the requirements of section 63-702 (1a) as far as necessary to set forth clearly the change in the certificate which it is desired to make, and
- (b) Be signed and sworn to by all members, and an amendment substituting a limited partner or adding a limited or general partner shall be signed also by the member to be substituted or added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner.
 - (2) The writing to cancel a certificate shall be signed by all members.
- (3) A person desiring the cancellation or amendment of a certificate, if any person designated in paragraphs (1) and (2) as a person who must execute the writing refuses to do so, may petition the district court to direct a cancellation or amendment thereof.
- (4) If the court finds that the petitioner has a right to have the writing executed by a person who refuses to do so, it shall order the county clerk and recorder in the office where the certificate is recorded to record the cancellation or amendment of the certificate; and where the certificate is to be amended, the court shall also cause to be filed for record in said office a certified copy of its decree setting forth the amendment.
- (5) A certificate is amended or canceled when there is filed for record in the office of the county clerk and recorder where the certificate is recorded:
- (a) A writing in accordance with the provisions of paragraph (1), or (2) or
- (b) A certified copy of the order of court in accordance with the provisions of paragraph (4).
- (6) After the certificate is duly amended in accordance with this section, the amended certificate shall thereafter be for all purposes the certificate provided for by this act.

History: En. Sec. 25, Ch. 252, L. 1947.

63-907. Parties to actions. A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership.

PARTNERSHIP

History: En. Sec. 26, Ch. 252, L. 1947.

Collateral References
Partnership ≈ 375.
68 C.J.S. Partnership § 484.

63-908. Name of act. This act may be cited as the Uniform Limited Partnership Act.

History: En. Sec. 27, Ch. 252, L. 1947.

- **63-909.** Rules of construction. (1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act.
- (2) This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.
- (3) This act shall not be so construed as to impair the obligations of any contract existing when the act goes into effect, nor to affect any action on proceedings begun or right accrued before this act takes effect.

History: En. Sec. 28, Ch. 252, L. 1947.

Collateral References
Partnership ≈351.
68 C.J.S. Partnership § 450.

63-910. Rules for cases not provided for in this act. In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.

History: En. Sec. 29, Ch. 252, L. 1947.

- **63-911.** Provisions for existing limited partnerships. (1) A limited or special partnership formed under any statute of this state prior to the adoption of this act, may become a limited partnership under this act by complying with the provisions of section 63-702; provided the certificate sets forth
- (a) The amount of the original contribution of each limited partner, and the time when the contribution was made, and
- (b) That the property of the partnership exceeds the amount sufficient to discharge its liabilities to persons not claiming as general or limited partners by an amount greater than the sum of the contributions of its limited partners.
- (2) A limited or special partnership formed under any statute of this state prior to the adoption of this act, until or unless it becomes a limited partnership under this act, shall continue to be governed by the provisions of the existing limited or special partnership acts, except that such partnership shall not be renewed unless so provided in the original agreement.

History: En. Sec. 30, Ch. 252, L. 1947.

CHAPTER 10

MINING PARTNERSHIP

Section 63-1001. When a mining partnership exists.

63-1002. Express agreement not necessary to constitute.

63-1003. Profits and losses-how shared.

63-1004. Lien of partners.

63-1005. Mine—partnership property.

63-1006. Partnership not dissolved by sale of interest. 63-1007. Purchaser takes, subject to liens, unless, etc.

63-1008. Takes with notice of lien, when.
63-1009. Contract in writing—when binding.
63-1010. Owners of majority of shares govern.

63-1001. (8050) When a mining partnership exists. A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the same.

History: En. Sec. 3350, Civ. C. 1895; re-en. Sec. 5535, Rev. C. 1907; re-en. Sec. 8050, R. C. M. 1921. Cal. Civ. C. Sec. 2511.

Cross-Reference

Action by tenant against cotenant, sec. 93-2829.

Creation by Law

A mining partnership, within the meaning of this section, exists when two or more persons are engaged in working a mining claim, whether as owners or lessees, and extracting mineral therefrom, the relationship, in the absence of an agreement to form such a partnership, being created by law upon the doing of the two things mentioned. State ex rel. Cole v. District Court, 79 M 1, 4, 6, 254 P 863.

General Partnership Distinguished

Mining partnerships differing from general partnerships were recognized by the decisions of this court before the enactment of this section July 1, 1895. Congdon v. Olds, 18 M 487, 489, 46 P 261.

Interest under Agreement with Lessee

An interest in a mine under agreement with lessee will not support a mining partnership. Crystal Copper Co. v. Gaido, 5 F 2d 881, 882.

Liabilities Incurred before Incorporation

Where a contract between the holder of a lease and bond on a mining claim and others who contributed money for the operations contained all the requirements necessary to constitute a mining partnership, and also provided that a corporation should be formed when contributors would exchange interests for stock therein, the contributors were responsible for liabilities incurred for operating expenses as mining partners under the present agreement to join in the immediate operation of the mine, effective even if no corporation was ever formed. Meister v. Farrow, 109 M 1, 16, 92 P 2d 753.

Qualifications Not Required of Members

Members need not have skill or knowledge of the practical working of a mine; they need not have actual control of mining operations; a "grubstake" contract does not create the relationship; it is not necessary that all the partners actually participate in removal of minerals. Meister v. Farrow, 109 M 1, 8, 92 P 2d 753.

Right of Surviving Partner to Partnership Property

The rule declared by section 91-3205, that in case of death of one member of a partnership the surviving partner has the right to the possession of all of the partnership property and to settle its business, and that the partnership assets form no part of the individual estate of the deceased partner until the partnership affairs have been wound up by the survivor applies to general trading partnerships only, not to mining partnerships. Bielenberg v. Higgins, 85 M 56, 65, 277 P 631.

Rights of Cotenants

Where the plaintiff owns an undivided three-fourths of a mining claim and the defendant the other one-fourth, and likewise an adjoining claim, through which, by underground workings, it is extracting the ores from a vein alleged to have its apex in the claim in which they are cotenants, and is appropriating such ores to itself and excluding the plaintiff from such disputed portions of the mine, a mining partnership does not exist, since it lacks the second essential condition of the relation, the actual working of the mine by the owners. Anaconda Copper Min. Co. v. Butte & Boston Min. Co., 17 M 519, 522, 43 P 924, distinguished in 109 M 1, 12, 92 P 2d 753, explained in 25 M 41, 77, 63 P 825 and 25 M 89, 106, 63 P 927.

What Sufficient to Meet Requirements

Ownership of a lease and bond meets the requirement of owning or acquiring a mining claim; persons furnishing money for mining operations have sufficient interest in ownership to become members; those who contribute the money for mining operations and share equally in the result are mining partners as much as those who work and supervise the mine. Meister v. Farrow, 109 M 1, 8, 92 P 2d 753.

References

Eisenberg v. Goldsmith, 42 M 563, 577, 113 P 1127; Wilkinson v. Bell, 118 M 403, 168 P 2d 601, 603; Butte Copper & Zine Co. v. Poague, 164 F 2d 201, 203.

Collateral References

Mines and Minerals \$97. 58 C.J.S. Mines and Minerals § 245.

See generally, 40 Am. Jur. 113, Partnership.

Powers, duties, and accounting respon-

sibilities of managing partner of mining partnership. 24 ALR 2d 1359.

Mining grubstake agreements distinguished from partnerships. 70 ALR 2d 907.

63-1002. (8051) Express agreement not necessary to constitute. An express agreement to become partners or to share the profits and losses of mining is not necessary to the formation and existence of a mining partnership. The relation arises from the ownership of shares or interests in the mine and working the same for the purpose of extracting the minerals therefrom.

History: En. Sec. 3351, Civ. C. 1895; re-en. Sec. 5536, Rev. C. 1907; re-en. Sec. 8051, R. C. M. 1921. Cal. Civ. C. Sec. 2512.

References

Anaconda Copper Min. Co. v. Butte &

Boston Min. Co., 17 M 519, 522, 43 P 924; Eisenberg v. Goldsmith, 42 M 563, 113 P 1127; State ex rel. Cole v. District Court, 79 M 1, 5, 254 P 863; Meister v. Farrow, 109 M 1, 8, 92 P 2d 753; Wilkinson v. Bell, 118 M 403, 168 P 2d 601, 603.

63-1003. (8052) **Profits and losses—how shared.** A member of a mining partnership shares in the profits and losses thereof in the proportion which the interest or share he owns in the mine bears to the whole partnership capital or whole number of shares.

History: En. Sec. 3352, Civ. C. 1895; re-en. Sec. 5537, Rev. C. 1907; re-en. Sec. 8052, R. C. M. 1921. Cal. Civ. C. Sec. 2513.

References

State ex rel. Cole v. District Court, 79 M 1, 6, 254 P 863; Meister v. Farrow, 109

M 1, 8, 92 P 2d 753; Butte Copper & Zinc Co. v. Poague, 164 F 2d 201, 203.

Collateral References

Mines and Minerals \$290(2). 58 C.J.S. Mines and Minerals § 246.

63-1004. (8053) Lien of partners. Each member of a mining partnership has a lien on the partnership property for the debts due the creditors thereof, and for money advanced by him for its uses. This lien exists, notwithstanding there is an agreement among the partners that it must not.

History: En. Sec. 3353, Civ. C. 1895; re-en. Sec. 5538, Rev. C. 1907; re-en. Sec. 8053, R. C. M. 1921. Cal. Civ. C. Sec. 2514.

Operation and Effect

The lien given by this section to each member of a mining partnership on the partnership property for the debts due its

creditors and for money advanced by him for its uses, is given for the purpose of enabling a partner to collect from his copartner his proportion of an indebtedness which he has been compelled to pay. Bielenberg v. Higgins, 85 M 56, 66, 277 P 631.

63-1005. (8054) **Mine—partnership property.** The mining ground owned and worked by partners in mining, whether purchased with partnership funds or not, is partnership property.

History: En. Sec. 3354, Civ. C. 1895; re-en. Sec. 5539, Rev. C. 1907; re-en. Sec. 8054, R. C. M. 1921. Cal. Civ. C. Sec. 2515.

References

Meister v. Farrow, 109 M 1, 8, 92 P 2d 753.

63-1006. (8055) Partnership not dissolved by sale of interest. One of the partners in a mining partnership may convey his interest in the mine and business without dissolving the partnership. The purchaser, from the date of his purchase, becomes a member of the partnership.

History: En. Sec. 3355, Civ. C. 1895; re-en. Sec. 5540, Rev. C. 1907; re-en. Sec. 8055, R. C. M. 1921. Cal. Civ. C. Sec. 2516.

References

Meister v. Farrow, 109 M 1, 8, 92 P 2d 753; Wilkinson v. Bell, 118 M 403, 168 P 2d 601, 603.

Collateral References

Mines and Minerals € 100. 58 C.J.S. Mines and Minerals § 248.

63-1007. (8056) Purchaser takes, subject to liens, unless, etc. A purchaser of an interest in the mining ground of a mining partnership takes it subject to the liens existing in favor of the partners for debts due all creditors thereof, or advances made for the benefit of the partnership, unless he purchased in good faith, for a valuable consideration, without notice of such lien.

History: En. Sec. 3356, Civ. C. 1895; re-en. Sec. 5541, Rev. C. 1907; re-en. Sec. 8056, R. C. M. 1921, Cal. Civ. C. Sec. 2517.

63-1008. (8057) **Takes with notice of lien, when.** The purchaser of the interest of a partner in a mine when the partnership is engaged in working it, takes with notice of all liens resulting from the relation of the partners to each other and to the creditors of the partnership.

History: En. Sec. 3357, Civ. C. 1895; re-en. Sec. 5542, Rev. C. 1907; re-en. Sec. 8057, R. C. M. 1921. Cal. Civ. C. Sec. 2518.

63-1009. (8058) Contract in writing—when binding. No member of a mining partnership or other agent or manager thereof can, by a contract in writing, bind the partnership, except by express authority derived from the members thereof.

History: En. Sec. 3358, Civ. C. 1895; re-en. Sec. 5543, Rev. C. 1907; re-en. Sec. 8058, R. C. M. 1921. Cal. Civ. C. Sec. 2519.

Operation and Effect

A mining partnership differs from a general partnership in the statutory restriction upon power of one member of a mining partnership to bind partnership by written contract unless expressly authorized by other members. Wilkinson v. Bell, 118 M 403, 168 P 2d 601, 603.

Where Partners Liable for Machinery Purchased

Members of a mining partnership held liable for machinery purchased by the one in charge of operations even though the latter prior to its delivery executed a conditional sales contract to plaintiff covering the machinery without express authority given by the remaining members under this section, where no rights were claimed by plaintiff under the contract and the judgment in its favor was not based thereon. Meister v. Farrow, 109 M 1, 21, 92 P 2d 753.

63-1010. (8059) Owners of majority of shares govern. The decision of the members owning a majority of the shares or interest in a mining partnership binds it in the conduct of its business.

History: En. Sec. 3359, Civ. C. 1895; re-en. Sec. 5544, Rev. C. 1907; re-en. Sec. 8059, R. C. M. 1921. Cal. Civ. C. Sec. 2520.

Conduct of Business

Under this section, the action of the members of a mining partnership owning a majority of the shares or interests therein binds the partnership in the conduct of its business, and such majority may do all things proper to its operations, take the necessary steps to preserve the partnership property, and select counsel for it. State ex rel. Cole v. District Court, 79 M 1, 7, 254 P 863.

Management and Control

Those who own a majority interest in a mining partnership are entitled to the management and control. Boehme v. Fitzgerald, 43 M 226, 227, 115 P 413.

References

Anaconda Copper Min. Co. v. Butte & Boston Min. Co., 17 M 519, 522, 43 P 924; Meister v. Farrow, 109 M 1, 8, 92 P 2d 753.

Collateral References

Mines and Minerals € 99. 58 C.J.S. Mines and Minerals § 246.

TITLE 64

PERSONS AND PERSONAL RIGHTS

Chapter 1. Persons, minors, adults and those of unsound mind, 64-101 to 64-114.

 Personal rights—libel and slander—protection of personal relations, 64-201 to 64-213.

CHAPTER 1

PERSONS, MINORS, ADULTS AND THOSE OF UNSOUND MIND

Section 64-101. Minors and adults defined.

64-102. Periods of minority-how calculated.

64-103. Unborn children.

64-104. Persons of unsound mind.

64-105. Powers of minors.

64-106. Contracts of minors—disaffirmance.

64-107. When minors may disaffirm.

64-108. Minor or person of unsound mind cannot disaffirm contract for necessaries.

64-109. Minor cannot disaffirm certain obligations.64-110. Contracts of persons without understanding.

64-111. Contracts of other persons of unsound mind.

64-112. Power of persons whose incapacity has been adjudged—presumption of legal capacity from certificate of institution superintendent or physician.

64-113. Minors and persons of unsound mind liable for wrongs, but not for exemplary damages.

64-114. Minors may enforce their rights.

64-101. (5673) Minors and adults defined. Minors are:

1. Males under twenty-one years of age;

2. Females under eighteen years of age.

All other persons are adults.

History: En. Secs. 10-11, Civ. C. 1895; re-en. Secs. 3584, 3586, Rev. C. 1907; reen. Sec. 5673, R. C. M. 1921. Cal. Civ. C. Sec. 25. Field Civ. C. Sec. 11.

Cross-Reference

Disability of minor veterans removed, sec. 77-1101.

Family Allowance from Estate

When daughter became eighteen years old her right to receive a family allowance under sections 91-2401 to 91-2403 terminated. In re Hall's Estate, 124 M 355, 224 P 2d 138, 139.

Operation and Effect

The controlling element in juvenile laws

is age, not minority; hence the contention that a female cannot be held under a commitment in the State Vocational School for Girls after she reaches the age of majority fixed by this section at eighteen years cannot be sustained. State ex rel. Foot v. District Court, 77 M 290, 295, 250 P 973, 49 ALR 398.

References

State v. Holt, 121 M 459, 194 P 2d 651, 657.

Collateral References

Infants 1.
43 C.J.S. Infants § 2.

64-102. (5674) Periods of minority—how calculated. The periods specified in the preceding section must be calculated from the first minute of the day on which persons are born to the same minute of the corresponding day completing the period of minority.

History: En. Sec. 11, Civ. C. 1895; re-en. Sec. 3585, Rev. C. 1907; re-en. Sec. 5674, R. C. M. 1921. Cal. Civ. C. Sec. 26.

Collateral References

Time € 4. 86 C.J.S. Time § 9. Inclusion or exclusion of day of birth in determining attainment of majority period. 5 ALR 2d 1147-1152.

Applicability of criminal statutes relating to offenses against children of a specified age with respect to a child who has passed the anniversary date of such age. 73 ALR 2d 874.

64-103. (5675) **Unborn children.** A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth.

History: En. Sec. 13, Civ. C. 1895; re-en. Sec. 3587, Rev. C. 1907; re-en. Sec. 5675, R. C. M. 1921. Cal. Civ. C. Sec. 29. Field Civ. C. Sec. 12.

Collateral References

Infants©→1. 43 C.J.S. Infants §§ 1, 3.

64-104. (5676) **Persons of unsound mind.** Persons of unsound mind, within the meaning of this code, are idiots, lunatics, imbeciles, and habitual drunkards.

History: En. Sec. 14, Civ. C. 1895; re-en. Sec. 3588, Rev. C. 1907; re-en. Sec. 5676, R. C. M. 1921. Field Civ. C. Sec. 13.

Collateral References

Drunkards 1; Insane Persons 1 et seg.

28 C.J.S. Drunkards § 2; 44 C.J.S. Insane Persons § 2.

64-105. (5678) **Powers of minors.** A minor cannot give a delegation of power.

History: En. Sec. 16, Civ. C. 1895; re-en. Sec. 3590, Rev. C. 1907; re-en. Sec. 5678, R. C. M. 1921. Cal. Civ. C. Sec. 33. Field Civ. C. Sec. 15.

Agency—Parents Neglect to Give Notice Not Imputable to Child—Child Incapable of Appointing Agent

The neglect of the parents of an injured child to give the sixty-day notice provided for by Ch. 122, Laws 1937 (11-1305), may not be imputed to the child, and since under this section, a child is incapable of appointing an agent for any purpose, it is questionable whether the statute can be

complied with in that respect by anyone as agent. Child's cause of action for damages for personal injuries is a property right over which, under section 61-110, a parent has no control. Lazich v. Belanger, 111 M 48, 52, 105 P 2d 738.

References

Flaherty v. Butte Electric Ry. Co., 40 M 454, 460, 107 P 416.

Collateral References

Infants 5; Powers 6.
43 C.J.S. Infants § 23; 72 C.J.S. Powers § 4.

64-106. (5679) **Contracts of minors—disaffirmance.** A minor may make a conveyance or other contract in the same manner as any other person, subject only to his power of disaffirmance under the provisions of this chapter, and to the provisions of the chapters on marriage.

History: En. Sec. 17, Civ. C. 1895; re-en. Sec. 3591, Rev. C. 1907; re-en. Sec. 5679, R. C. M. 1921. Cal. Civ. C. Sec. 34. Field Civ. C. Sec. 16.

Cross-References

Contracts by minors, sec. 13-202. Minor veterans, disability removed, sec. 77-1101.

Collateral References

Infants 346.
43 C.J.S. Infants §§ 49, 54, 56, 71, 76, 80, 83, 86.
27 Am. Jur. 753, Infants, §§ 10 et seq.

Agreement to arbitrate future controversies as binding on infant. 78 ALR 2d 1292.

64-107. (5680) When minors may disaffirm. In all cases other than those specified by sections 64-108 and 64-109, the contract of a minor may,

upon restoring the consideration to the party from whom it was received, be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards, or in case of his death within that period, by his heirs or personal representatives.

History: En. Sec. 18, Civ. C. 1895; re-en. Sec. 3592, Rev. C. 1907; re-en. Sec. 5680, R. C. M. 1921. Cal. Civ. C. Sec. 35. Field Civ. C. Sec. 17.

Notice

Since no particular form of disaffirmance of a contract by an infant is prescribed by this section, a notice to the seller amounting to an unequivocal act on the infant's part of his intention to avoid the sale was sufficient. Stanhope v. Shambow, 54 M 360, 363, 170 P 752.

Pleading Exception to Rule

A party desiring to rely upon the exception to the rule that a minor may disaffirm a contract (this section) provided for by section 64-108, to the effect that he cannot disaffirm a contract to pay the reasonable value of things necessary for his support, must plead that the things furnished were necessaries in his complaint or reply. Downey v. Northern Pacific Ry. Co., 72 M 166, 182 et seq., 232 P 531.

Restoration of Consideration

Where an infant purchaser of an automobile disaffirmed his contract of purchase, and made complete restoration by redelivering it in substantially the same condition as when he bought it, both he and his sureties were discharged from further liability. Stanhope v. Shambow, 54 M 360, 363, 170 P 752.

An infant may disaffirm the contracts made by him, other than those for neces-

saries and those entered into under express statutory authority or direction, during infancy or within a reasonable time after reaching majority, provided he first makes restoration of the consideration, thus placing the other party in status quo. Stanhope v. Shambow, 54 M 360, 363, 170 P 752.

Return of Consideration

Where from the very nature or character of a consideration received by a minor for the execution of a contract (services performed by attorneys under a contract of employment to institute an action) it cannot be returned by him as required by this section as a condition precedent to disaffirmance, he may disaffirm though unable to make return. Downey v. Northern Pacific Ry. Co., 72 M 166, 182 et seq., 232 P 531.

Col'ateral References

Infants \$\sim 58.
43 C.J.S. Infants § 75.
27 Am. Jur. 771, Infants, §§ 33 et seq.

Failure to disaffirm as ratification of infant's executory contract. 5 ALR 2d 7.

Joining in instrument as ratification of prior instrument affecting real property ineffective because of infancy of party.

7 ALR 2d 305, 326, 340, 355

7 ALR 2d 305, 326, 340, 355.

Measure of infant's recovery for value of chattel traded for another upon his rescission of the transaction. 52 ALR 2d 1114.

64-108. (5681) Minor or person of unsound mind cannot disaffirm contract for necessaries. A minor, or a person of unsound mind, cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for his support or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them.

History: En. Sec. 19, Civ. C. 1895; re-en. Sec. 3593, Rev. C. 1907; re-en. Sec. 5681, R. C. M. 1921. Cal. Civ. C. Sec. 36. Field Civ. C. Sec. 18.

Operation and Effect

Quaere: Is the employment of an attorney by a minor to prosecute an action for false imprisonment a "necessary" within the meaning of this section, a contract for which he cannot disaffirm upon obtaining majority? Downey v. Northern Pacific Ry. Co., 72 M 166, 182 et seq., 232 P 531.

A party desiring to rely upon the exception to the rule that a minor may disaffirm a contract (64-107) provided for by this section, to the effect that he cannot disaffirm a contract to pay the reasonable value of things necessary for his support, must plead that the things furnished were necessaries in his complaint or reply. Downey v. Northern Pacific Ry. Co., 72 M 166, 182 et seq., 232 P 531.

References

Stanhope v. Shambow, 54 M 360, 362, 170 P 752.

Collateral References

Infants 50 et seq.; Insane Persons @m75.

43 C.J.S. Infants § 78; 44 C.J.S. Insane Persons § 115. 27 Am. Jur. 758, Infants, §§ 16-22.

64-109. (5682) Minor cannot disaffirm certain obligations. A minor cannot disaffirm an obligation, otherwise valid, entered into by him under the express authority or direction of a statute. 170 P 752; Downey v. Northern Pacific Ry. Co., 72 M 166, 182 et seq., 232 P 531.

History: En. Sec. 20, Civ. C. 1895; re-en. Sec. 3594, Rev. C. 1907; re-en. Sec. 5682, R. C. M. 1921. Cal. Civ. C. Sec. 37. Field Civ. C. Sec. 19.

16 ALR 2d 1420.

Collateral References Right of infant to disaffirm his sale of personalty and recover it from third person purchasing without notice of infancy.

References

Stanhope v. Shambow, 54 M 360, 363.

64-110. (5683) Contracts of persons without understanding. A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family.

History: En. Sec. 21, Civ. C. 1895; re-en. Sec. 3595, Rev. C. 1907; re-en. Sec. 5683, R. C. M. 1921. Cal. Civ. C. Sec. 38.

restore everything of value deceased had received from defendant was not required. Kiley v. Danahey, 61 M 608, 612, 202 P 1110.

Overpowering Will of Grantee

In an action by an administratrix to set aside a deed on the ground that when her intestate executed it she was without understanding sufficient to make a valid contract, complaint examined and held sufficient to permit of proof from which the inference could properly be drawn that the grantor in putting her cross to and delivering the deed acted in obedience to the overpowering will of the grantee. Kiley v. Danahey, 61 M 608, 612, 202 P 1110.

Restoration of Consideration

Plaintiff having based her action on the ground that at the time the deceased grantor executed the deed sought to be set aside she did not have capacity to make a contract under this section, and not on the ground that she was entitled to rescind under section 64-111, an allegation that she had restored or offered to

Validity of Contract

A contract made with a person entirely without understanding is void ab initio (this section), while one made with a person of unsound mind "but not entirely without understanding" (64-111) is voidable only at the suit of one seeking to rescind on one of the grounds mentioned in the chapter of the codes relating to rescission. Fleming v. Consolidated M. S. Co., 74 M 245, 252 et seq., 240 P 376.

References

Murphy v. LaChapelle, 95 M 36, 38, 24 P 2d 131; Stagg v. Stagg, 96 M 573, 592 et seq., 32 P 2d 856.

Collateral References

Insane Persons 72, 75.

44 C.J.S. Insane Persons §§ 110, 112, 115. 29 Am. Jur. 187, Insane and Other Incompetent Persons, §§ 65-102.

64-111. (5684) Contracts of other persons of unsound mind. A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on rescission of this code.

History: En. Sec. 22, Civ. C. 1895; re-en. Sec. 3596, Rev. C. 1907; re-en. Sec. 5684, R. C. M. 1921. Cal. Civ. C. Sec. 39. Field Civ. C. Sec. 21.

Cross-Reference

Persons of unsound mind, power to make contracts, sec. 13-202.

Restoration of Consideration

Plaintiff having based her action on the ground that at the time the deceased grantor executed the deed sought to be set aside she did not have capacity to make a contract under section 64-110, and not on the ground that she was entitled to rescind under this section, an allegation that she had restored or offered to restore everything of value deceased had received from defendant was not required. Kiley v. Danahey, 61 M 608, 612, 202 P 1110.

Undue Influence

Where defendant in an action on a promissory note pleaded in defense undue influence and lack of consideration, and in addition relied upon this section, providing that a contract of a person of unsound mind is subject to rescission, and the evidence was sufficient to warrant a verdict in his favor as to undue influence and lack of consideration, it was immaterial that he did not proceed to have the note rescinded. Stagg v. Stagg, 96 M 573, 592 et seq., 32 P 2d 856.

Validity of Contract

A contract made with a person entirely without understanding is void ab initio (64-110), while one made with a person of unsound mind "but not entirely without understanding" (this section) is voidable only at the suit of one seeking to rescind on one of the grounds mentioned in the chapter of the codes relating to rescission. Fleming v. Consolidated M. S. Co., 74 M 245, 252 et seq., 240 P 376.

References

Murphy v. LaChapelle, 95 M 36, 38, 24 P 2d 131.

Collateral References

Contracts 22; Insane Persons 73 et

17 C.J.S. Contracts § 133; 44 C.J.S. Insane Persons §§ 109-112.

64-112. (5685) Power of persons whose incapacity has been adjudged—presumption of legal capacity from certificate of institution superintendent or physician. After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, except where such contract confers a beneficial interest to his estate, nor delegate any power, nor waive any right, until his restoration to capacity; but a certificate from the medical superintendent or resident physician or other officer of the insane asylum to which such person may have been committed, whether said insane asylum is in this state or elsewhere, showing that such person has been discharged, released or paroled therefrom, cured and restored to reason, or discharged, released, or paroled in an improved condition shall establish the presumption of legal capacity in such person from the time of such discharge, release or parole.

History: En. Sec. 23, Civ. C. 1895; re-en. Sec. 3597, Rev. C. 1907; re-en. Sec. 5685; R. C. M. 1921; amd. Sec. 1, Ch. 8, L. 1925. Cal. Civ. C. Sec. 40. Based on Field Civ. C. Sec. 22.

Presumption of Insanity Rebuttable

By virtue of this section an adjudication of insanity under sections 38-201 to 38-208 does not establish a conclusive, but a rebuttable presumption of insanity, It substitutes for the presumption of sanity the presumption of insanity until the certificate provided for is obtained. State v. Bucy, 104 M 416, 419, 66 P 2d 1049.

References

State v. Kitchens, 129 M 331, 286 P 2d 1079, 1081.

Collateral References

Insane Persons ₹ 4, 5, 60, 72. 44 C.J.S. Insane Persons §§ 3, 98, 100, 103-106, 110, 112, 116.

29 Am. Jur. 191, Insane and Other Incompetent Persons, § 67.

64-113. (5686) Minors and persons of unsound mind liable for wrongs, but not for exemplary damages. A minor, or person of unsound mind, is civilly liable for a wrong done by him, but is not liable in exemplary damages unless at the time of the act he was capable of knowing that it was wrongful.

History: En. Sec. 24, Civ. C. 1895; re-en. Sec. 3598, Rev. C. 1907; re-en. Sec. 5686, R. C. M. 1921. Cal. Civ. C. Sec. 41.

Collateral References

Infants 59, 64; Insane Persons 80, 82 et seq.

43 C.J.S. Infants §§ 87, 89, 92; 44 C.J.S. Insane Persons §§ 123-125.

27 Am. Jur. 812, Infants, §§ 90-96; 29 Am. Jur. 228, Insane and Other Incompetent Persons, §§ 104-112.

Tort liability of child of tender years. 67 ALR 2d 570.

64-114. (5687) Minors may enforce their rights. A minor may enforce his rights by civil action, or other legal proceedings, in the same manner as a person of full age, except that a guardian must conduct the same.

History: En. Sec. 25, Civ. C. 1895; re-en. Sec. 3599, Rev. C. 1907; re-en. Sec. 5687, R. C. M. 1921. Cal. Civ. C. Sec. 42. Field Civ. C. Sec. 25.

Operation and Effect

At common law an infant plaintiff sued by guardian ad litem, but under the statutes of this state he appears by his general guardian or his guardian ad litem. Flaherty v. Butte Electric Ry. Co., 40 M 454, 459, 107 P 416; Melzner v. Northern Pacific Ry. Co., 46 M 162, 175, 127 P 146.

References

State ex rel. Haynes v. District Court, 106 M 578, 584, 81 P 2d 422; Mitchell v. McDonald, 114 M 292, 298, 136 P 2d 536.

Collateral References

Infants@70, 78. 43 C.J.S. Infants § 108. 27 Am. Jur. 833, Infants, §§ 113 et seq.

CHAPTER 2

PERSONAL RIGHTS-LIBEL AND SLANDER-PROTECTION OF PERSONAL RELATIONS

Section 64-201. General personal rights.

> 64-202. Defamation—how effected.

64-203. Libel defined.

64-204. Slander, what constitutes.

Liability of owner of radio station-libel. 64-205.

Submission of copy of address. 64-206.

Construction of act—liability for libel. 64-207.

64-207.1. Notice in writing to publisher of libelous or defamatory matter-opportunity to correct—defense and mitigation of damages.

What communications are privileged. 64-208.

Protection of personal relations. Right to use force. 64-209.

64-210.

64-211. Discrimination on grounds of race, color, or creed in places of public accommodation or amusement prohibited.

64-212. Merchant, premises and merchandise defined.

64-213. Right of merchant to request individuals to keep merchandise in full view-freedom from liability.

(5688) General personal rights. Besides the personal rights mentioned or recognized in this code, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations.

History: En. Sec. 30, Civ. C. 1895; re-en. Sec. 3600, Rev. C. 1907; re-en. Sec. 5688, R. C. M. 1921. Cal. Civ. C. Sec. 43. Field Civ. C. Sec. 27.

References

McKenzie v. Doran, 39 M 593, 596, 104 P 677.

Collateral References

Civil Rights 1 et seq.; Libel and Slander 1 et seq.; Torts 3.

14 C.J.S. Civil Rights § 1; 53 C.J.S.

Libel and Slander § 64.

64-202. (5689) **Defamation—how effected.** Defamation is effected by:

- Libel:
- Slander.

History: En. Sec. 31, Civ. C. 1895; re-en. Sec. 3601, Rev. C. 1907; re-en. Sec. 5689, R. C. M. 1921. Cal. Civ. C. Sec. 44. Field Civ. C. Sec. 28.

References

McKenzie v. Doran, 39 M 593, 596, 104 P 677.

Collateral References

Libel and Slander

53 C.J.S. Libel and Slander

5 et seq.
33 Am. Jur. 29, Libel and Slander.

Statement or publication that plaintiff has been indicted or is under indictment, as defamation. 52 ALR 2d 1178.

Defamatory nature of charges or imputations in conditional or alternative form. 59 ALR 2d 928.

Defamation by attack on author's or artist's character. 64 ALR 2d 257.

Defamation by acts, gestures, pantomime, or the like. 71 ALR 2d 808.

Defamatory nature of utterances or statements made, or articles written, in jest. 77 ALR 2d 612.

Law Review

Kimball, "Defamation: the Montana law," 20 Mont. L. Rev. 1 (Fall 1958).

64-203. (5690) Libel defined. Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

History: En. Sec. 32, Civ. C. 1895; re-en. Sec. 3602, Rev. C. 1907; re-en. Sec. 5690, R. C. M. 1921. Cal. Civ. C. Sec. 45. Field Civ. C. Sec. 29.

Business Advertising

A private corporation may maintain an action for libel respecting its business. Professional & Business Men's Life Ins. Co. v. Bankers Life Co., 163 F Supp 274, 276, 287.

Newspaper ad to buyers of life insurance warning them about representations by certain agents and requesting that they report proposals offered to insurance commissioner for his opinion was libelous per se. Professional & Business Men's Life Ins. Co. v. Bankers Life Co., 163 F Supp 274, 276, 289.

Complaint

To state a cause of action for general damages, the language complained of must be libelous per se, and to be libelous per se, the language must be such as, without the aid of innuendo, imputes to the aggrieved party the commission of a crime, or necessarily exposes him to hatred, contempt, ridicule, or obloquy. Brown v. Independent Publishing Co., 48 M 374, 379, 138 P 258; Cooper v. Romney, 49 M 119, 125, 141 P 289; Lemner v. The "Tribune," 50 M 559, 564, 148 P 338.

A complaint against a newspaper for libel which does not plead special damages does not state a cause of action unless the article published was libelous per se. Nolan v. Standard Publishing Co., 67 M 212, 220, 216 P 571.

Unless a publication is libelous per se, the complaint, must, to state a cause of action for libel, allege special damages. Porak v. Sweitzer's, Inc., 87 M 331, 339, 287 P 633.

A newspaper article relating to acts and conduct of an employee of a rival paper said to have been done and indulged in in an effort to injure the former, examined and held not libelous per se, in the absence of innuendo or explanation, nor sufficient to show that it injured plaintiff in his business or profession, exposed him to hatred, contempt, ridicule or obloquy, or caused him to be shunned or avoided (this section), and demurrer to the complaint should have been sustained. Woolston v. Montana Free Press, 90 M 299, 2 P 2d 1020.

Damages

Words defamatory per se carry the presumption of falsity and damage and therefore where a publication is libelous per se the plaintiff may recover general damages without allegation or proof of special damages; on the contrary, where the words are not actionable per se, there can be no recovery of general damages without a pleading of special damages. Manley v. Harer, 73 M 253, 258, 235 P 757. General damages in the law of libel are

General damages in the law of libel are those which the law presumes actually, proximately and necessarily result from the publication of the defamatory matter, while special damages are the natural, but not the necessary, result thereof, and do not follow by implication of law upon proof of the defamatory words. Manley v. Harer, 73 M 253, 258, 235 P 757.

Harer, 73 M 253, 258, 235 P 757.
Under the law of libel, words are defamatory per se which upon their face and without the aid of extrinsic proof are injurious to the person concerning whom they are published, and in such a case

general damages are recoverable. Magelo v. Roundup Coal Mining Co., 109 M 293, 302, 96 P 2d 932.

Where in an action against a newspaper for libel no special damages were pleaded, plaintiff, to be entitled to damages, was required to plead and prove that the published language complained of, unaided by any innuendo, was actionable per se; having failed to do so, objection to the introduction of testimony and defendant's motion for a directed verdict in its favor should have been sustained. Griffin v. Opinion Publishing Co., 114 M 502, 520, 138 P 2d 580.

Definitions

"Inducement" in a declaration for libel under common-law pleading is the narration of the extrinsic circumstances which, coupled with the published language, affects its construction and renders it actionable, when, standing alone, the lan-guage would appear either not to affect plaintiff or not to affect him injuriously, and "colloquium" is the allegation that the published language was concerning plaintiff, or him, and his affairs, or him and the facts alleged as inducement. Nolan v. Standard Publishing Co., 67 M 212, 220, 216 P 571.

Alleged libelous words must be construed according to their usual, popular and natural meaning and common acceptation—in the sense in which persons of ordinary intelligence would understand them—the presumption being that those who saw them, so understood them. Porak v. Sweitzer's, Inc., 87 M 331, 339, 287 P

Falsity of Publication

In an action for libel, the plaintiff must be nonsuited unless he introduces affirmative evidence of the falsity of the publication. So far as presumptions are concerned, the evidence is at equipoise at the very outset of the case. Cooper v. Romney, 49 M 119, 128, 141 P 289.

Libel of Unlawful Business Not Possible

Where an alleged libel is in respect to an unlawful business carried on by a person, such as that pursued by a professional wrestler, contrary to the penal laws of the state on the subject, he cannot maintain an action for the purpose of recovering damages for injury to his business. Brown v. Independent Publishing Co., 48 M 374, 379, 138 P 258.

Libel Per Quod

A newspaper article published concerning a member of a board of county commissioners seeking re-election referring to "the interesting way he has of prying open the lid of the county strong box" and likening him to "Kaiser Bill," so far as the former statement is concerned, if libelous, was libelous per quod, requiring an innuendo to explain it, and not per se, and the latter was simply sarcasm and not libelous. Burr v. Winnett Times Publishing Co., 80 M 70, 258 P 242.

To give rise to an action for damages for libel the words published must have been actionable per se, or actionable per quod, and in the absence of an allegation or proof of special damages libel per quod is eliminated from the case; to be actionable per se their injurious character must have been a fact of such common notoriety as to be established by the general consent of men so that courts take judicial notice of it, and where the language is clear and unambiguous it is the duty of the trial court to determine whether it is actionable per se or per quod. Griffin v. Opinion Publishing Co., 114 M 502, 508, 138 P 2d 580.

Libel Per Se

In determining whether a publication is libelous per se, the language complained of must be construed in its relation to the entire article in which it appears, for its ordinary meaning may be limited or changed by the circumstances, or by qualifications expressly annexed to its use. Paxton v. Woodward, 31 M 195, 207, 78 P 215; Cooper v. Romney, 49 M 119, 125,

The fact that a reporter believed statements which were libelous per se to be fair and true, or that defendant publisher, accepting them as true, published the story as a fair and true one, did not constitute any excuse or justification in an action for libel. Kelly v. Independent Publishing Co., 45 M 127, 139, 122 P 735.

In determining whether language complained of is libelous per se, it must be considered in its relation to the entire article in which it appears; and to warrant the conclusion that it is of such character, the words must be susceptible of but one meaning, namely, that from its publication pecuniary loss to plaintiff necessarily must, or presumably did, follow as its proximate consequence. Brown v. Independent Publishing Co., 48 M 374, 381. 138 P 258.

A publication charging that county commissioners, in letting a public printing contract did so without advertising for bids and out of favoritism, with the evident desire "to deflect all possible graft" the publisher's way, and containing a suggestion that the named amount of money was to be "cut up" among the commissioners, if false and unprivileged, was libelous per se. Cooper v. Romney, 49 M 119, 126, 141 P 289. A newspaper article headed "The White-Livered Shyster" which in its body imputed grossly criminal conduct to an attorney, charging him with "creating sham issues," "preaching violation of the law and defiance of the Constitution he has sworn to defend," "inciting anarchy," etc., was libelous per se. Nolan v. Standard Publishing Co., 67 M 212, 220, 216 P 571.

Language which is not libelous per se cannot be made so by innuendo. Manley v. Harer, 73 M 253, 258, 235 P 757.

Words which upon their face and with-

Words which upon their face and without the aid of intrinsic proof are injurious to the person concerning whom they are uttered are defamatory per se; but if the words are of doubtful significance or derive their libelous character from extraneous facts they are not so and the pleader must allege the meaning intended or set forth such facts by proper averment. Manley v. Harer, 73 M 253, 258, 235 P 757.

To be characterized as libelous per se, the words used must be susceptible of but one meaning. Manley v. Harer, 73 M 253, 258, 235 P 757. See also Burr v. Winnett Times Publishing Co., 80 M 70, 258 P 242.

Words which in themselves injuriously affect one in his profession, business or employment or which impute dishonesty or corruption to an individual or which charge him with unfaithfulness to his employer are actionable per se. Manley v. Harer, 73 M 253, 258, 235 P 757.

A newspaper article falsely charging a member of a board of county commissioners, in conjunction with the other members, of conducting county business behind closed doors, with keeping county records for public inspection, and with secretly passing a bond issue in a large amount at the highest legal rate of interest, in violation of statutory provisions, whether thus charging a misdemeanor or not, is libelous per se, such charges being sufficient to deprive an official of the benefits of public confidence. Burr v. Winnett Times Publishing Co., 80 M 70, 258 P 242.

A writing that a person, not a merchant or engaged in a vocation wherein credit is required, owes a debt and refuses to pay is not libelous per se, and therefore does not render the publisher liable without proof of special damages. Porak v. Sweitzer's, Inc., 87 M 331, 339, 287 P 633.

Under the last above rule, held that the complaint in an action for libel by one employed in a clerical capacity against a member of a merchants' association which periodically published reports of delinquent debtors and mailed them to its members in the city of plaintiff's residence and elsewhere, merely alleging that plaintiff's name was therein published as owing

defendant a stated amount, that the publication was malicious and made for the purpose of injuring her reputation, etc., but not setting up special damages, did not state a cause of action, the publication not having been libelous per se, and judgment of nonsuit was proper. Porak v. Sweitzer's, Inc., 87 M 331, 339, 287 P 633.

The words used in an alleged libelous newspaper article must be susceptible of but one meaning to constitute libel per se; the libelous matter may not be segregated from other parts and construed alone, but the entire statement must be viewed by the court as a stranger might look at it, without the aid of special knowledge possessed by the parties concerned. Woolston v. Montana Free Press, 90 M 299, 2 P 2d 1020.

While it is the law that to assert a suspicion, belief or opinion, is as effectively a libel as though the charge were positively made, a statement in a printed article that an effort had been made to secure the mailing list of a newspaper "in an unethical and underhand manner," and that the surrounding circumstances seemed to warrant the conclusion that the "advertising man" (meaning plaintiff) of another paper was behind the effort, held not libelous per se, in the absence of further statements, as to the conduct of the person or persons who made the attempt, or the extent of the responsibility of plaintiff for the effort in the way it was made. Woolston v. Montana Free Press, 90 M 299, 2 P 2d 1020.

Under the last clause of this section which declares libel to be a false and unprivileged publication which has a tendency to injure a person in his occupation, held that it is immaterial whether the publication contains opprobrious statements or not; if language damages person about whose affairs published, it is libelous per se. (Holding in Lemer v. The "Tribune," 50 M 559, 148 P 338, to the contrary overruled.) Miller Ins. Agency v. Home Fire & Marine Ins. Co. of Calif., 100 M 551, 564, 51 P 2d 628.

Malice

Under the code definition of libel, no mention is made of malice, and the presence or absence of malice becomes material only as a circumstance affording a basis for increasing or diminishing the amount of recovery, and in cases involving the question of privileged communication. Paxton v. Woodward, 31 M 195, 211, 78 P 215; Cooper v. Romney, 49 M 119, 127, 141 P 289. See also Manley v. Harer, 82 M 30, 35, 264 P 937.

Publication of Libel

Complaint by private corporation for libel was sufficient where it charged that

the publication was made of and concerning it. Professional & Business Men's Life Ins. Co. v. Bankers Life Co., 163 F Supp 274, 276, 288, 289.

Statements Neither False Nor Defama-

The following statements, under the facts and circumstances presented, held neither false nor defamatory: that the published article will be a "scoop"; "Gather round you boy scouts and girl scouts and learn a few wrinkles in civil affairs"; that plaintiff's offer to compromise his claim against the city was "a hot one tossed on the table" and that the claim was of "dubious legality"; "few men can serve and sue the city at the same time. Just how the city can legally pay a claim for which it is not obligated is quite difficult of solution. Even with the aid of the higher branches of the law," held not defamatory. Griffin v. Opinion Publishing Co., 114 M 502, 515, 138 P 2d 580.

The Truth

The truth of an alleged defamatory statement of fact is a complete defense to an action for libel. To constitute publication of a newspaper article libelous under this section, it must be false, unprivileged and defamatory; hence where the evidence establishes it to have been true, privileged and not defamatory, there was no libel. Griffin v. Opinion Publishing Co., 114 M 502, 507, 138 P 2d 580.

Collateral References

Libel and Slander € 6-18.

53 C.J.S. Libel and Slander §§ 13-32 et seq., 43, 53 et seq., 62.

Statement or testimony in lunacy proceedings as privileged within law of libel and slander. 2 ALR 1582.

Libel: listing nontraders as unworthy of credit. 3 ALR 1590.

Libel and slander: privilege of com-munications in relation to member, or prospective member, of society, other than church. 3 ALR 1654 and 15 ALR 453.

Libel and slander: communications between officers of corporation. 5 ALR 455. Liability of town or municipality for libel or slander. 9 ALR 351.

Orally charging a woman with being a whore or prostitute as actionable per se. 11 ALR 669.

Libel and slander: communications by employer to surety company regarding employee. 11 ALR 1014.

Libel and slander: charging one with being a "slacker." 11 ALR 1017; 49 ALR 260; 140 ALR 1533 and 141 ALR 1526.

Retraction as affecting right of action or amount of damages for libel or slander. 13 ALR 794 and 13 ALR 2d 277.

Charging merchant with using false weights or measures as libel or slander. 13 ÅLR 1019.

Libel and slander: privilege of statement or communication by official charged with prosecution or detection of crime. 15 ALR 249.

Liability of one responsible for original libel or slander for its repetition by a third person. 16 ALR 726 and 41 ALR

Possibility of actual malice which will defeat conditional privilege in libel or slander co-existing with belief in truth of imputation. 18 ALR 1160.

Personal liability of servant or agent to third person for libel published by him while acting in the capacity of servant or agent. 20 ALR 116.

Libel or slander as affected by mistake in statement or publication as to name or description of person to whom it relates. 26 ALR 454 and 41 ALR 485.

Relative provinces of court and jury as to privileged occasion and privileged communication in law of libel and slander. 26 ALR 830.

Right of municipal corporation to maintain action for libel or slander. 28 ALR

Abusive words as slander or libel. 37 ALR 883.

Libel or slander affecting bank. 37 ALR

Libel by headlines. 40 ALR 583 and 59 ALR 1061.

Common report as defense to action for libel or slander. 43 ALR 887.

Libel by recall petition. 43 ALR 1268. Libel and slander: imputing disease as actionable per se. 45 ALR 1114.

Libel and slander: liability of member of a credit association for reporting one as a delinquent debtor. 48 ALR 573.

Libel and slander: imputing disposition to avoid service in war. 49 ALR 260.

Action by corporation for libel or slander. 52 ALR 1199 and 86 ALR 442.

Libel and slander: what imputations against clergymen are actionable. 53 ALR $6\bar{3}7.$

Moral imputation of sexual immorality to man as actionable per se. 55 ALR 175.

Libel and slander: defamation of one in his character as a political leader or "boss." 55 ALR 854.

Libel or slander by imputation of drunkenness. 58 ALR 1157.

Libel or slander of stockholder or officer by publication or statement which reflects on him as well as on corporation. 58 ALR

Libel and slander: privilege as to communications respecting church matters. 63 ALR 649.

Liability of telegraph or telephone company for transmitting or permitting transmission of libelous or slanderous messages. 63 ALR 1118.

Libel and slander: imputation of mental disorder, impairment of mental faculties, or want of mental capacity, as actionable per se. 66 ALR 1257.

Statement with reference to discharge from private employment as actionable per se. 66 ALR 1499.

Libel and slander: privilege as to communications to one spouse reflecting on other spouse. 69 ALR 1023.

Law of libel and slander in its application to reflections on ability or skill of public performers, or persons associated with public performances as managers, trainers, etc. 72 ALR 921.

Communication between relatives or members of a family as publication or subject of privilege within law of libel and slander. 78 ALR 1182.

Libel and slander: accidental communication, not intended by defendant, as a publication. 81 ALR 110.

Libel and slander: radio communication and broadcasting. 82 ALR 1109.

Libelous or privileged character of publication by newspaper based on matters received from news agency or regular correspondent. 86 ALR 475.

Libel by will. 87 ALR 234.

Liability of telegraph company for punitive damages for wrongful or negligent acts of employees as regards messages. 89 ALR 356.

Mental or physical suffering as element of damages for libel or slander. 90 ALR 1175.

Sufficiency of identification of plaintiff by publication or statement complained of, as libelous or slanderous. 91 ALR 1161.

Libel and slander: qualified privilege as regards publication of matters in relation to members of private or quasi public bodies in newspapers or journals of general circulation or in those intended primarily for circulation among their members. 92 ALR 1029.

Libel and slander: words or publication imputing marital discord as actionable per se. 92 ALR 1128.

Defamatory words spoken with regard to a customer's conduct as constituting actionable slander. 92 ALR 1174.

Right of individual member of class or group referred to in a defamatory publication to maintain action for libel or slander. 97 ALR 281 and 70 ALR 2d 1382.

Libel and slander: privilege of communications made to employee regarding conduct of another employee or former employee. 98 ALR 1301.

Law of libel or slander as applied to motion pictures. 99 ALR 878.

Libel and slander: qualified privilege of reply to defamatory publication. 103 ALR 476

Libel and slander: privilege as to reports of judicial proceedings as attaching to publication of meetings, etc., before hearings. 104 ALR 1124.

Doctrine of privilege or fair comment as applicable to misstatements of fact in publication (or oral communication) relating to public officer or candidate for office. 110 ALR 412 and 150 ALR 358.

Imputing to lawyer solicitation of business or fomenting of litigation as libelous. 112 ALR 177.

Admissibility of testimony of person who spoke or wrote the words upon which an action for slander or libel is predicated as to his intention or the sense in which the words were spoken or written. 113 ALR 670.

Libel and slander: imputation of price cutting, 118 ALR 317.

Libel and slander: garbled, inaccurate, or mistaken report of judicial proceedings as within privilege. 120 ALR 1236.

Libel and slander: imputation of association with persons of race or nationality as to which there is social prejudice. 121 ALR 1151.

Statement or publication respecting physician, surgeon, or dentist, as ground of action for slander or libel. 124 ALR 553.

Libel and slander: defamation of diseased person as ground of action by members of his family, or other persons associated with him, in their own right, because of its tendency to subject them to ridicule or contempt. 132 ALR 891.

Libel and slander: scope of absolute privilege of executive officer. 132 ALR 1340.

Libel and s'ander: privilege of communications made by private person or concern to public authorities regarding one not in public employment. 136 ALR 543.

Libel and slander: privilege as to allegations in judicial proceedings contrary to facts as previously adjudicated. 136 ALR 1414.

Libel and slander: imputation of poverty. 137 ALR 913.

Libel and slander: publication of notice of cessation of relationship of principal and agent or employer and employee, or of business or professional relationships. 138 ALR 671.

Libel and slander: privilege regarding communications to police or other officer respecting commission of crime. 140 ALR 1466.

Libel and slander: privilege as regards publication of judicial opinion. 146 ALR 913.

Venue of action for libel in newspaper. 148 ALR 477.

Libel and slander: privilege in respect of communication to employer regarding indebtedness of employee. 151 ALR 1104.

Libel and slander: statements in the nature of comment upon judicial, legislative, or administrative proceeding, or the decision therein, as within privilege accorded to proceeding or report thereof. 155 ALR 1346.

Libel and slander: lack of jurisdiction as destroying privilege of defamatory allegations or statements in judicial proceedings. 158 ALR 592.

Libel and slander: communication or exhibition to employee or business associate of defendant as publication or privilege. 166 ALR 114.

Words reflecting upon one in his character as employee as actionable per se. 6 ALR 2d 1008.

Liability of police or other officer for defamation. 13 ALR 2d 897.

Libel and slander: statements regarding labor relations or disputes. 19 ALR 2d

Libel and slander: imputation of objectionable political or sociological principles or practices. 33 ALR 2d 1196.

Imputation of perjury or false swearing as actionable per se. 38 ALR 2d 161.

Liability for statement or publication representing plaintiff as cruel to or killer of animals. 39 ALR 2d 1388.

Action for libel as remedy of workman blacklisted by labor union. 46 ALR 2d

Libel and slander: statements respecting race, color, or nationality as actionable. 46 ALR 2d 1287.

Actionability of statement imputing incapacity, inefficiency, misconduct, fraud, dishonesty or the like to public officer or employee. 53 ALR 2d 8.

Libel and slander: privilege in respect of publications relating to proceedings to disbar or otherwise discipline attorney. 77 ALR 2d 493.

(5691) Slander, what constitutes. Slander is a false and unprivileged publication other than libel, which:

- Charges any person with crime, or with having been indicted, convicted, or punished for crime;
- Imputes in him the present existence of an infectious, contagious, or loathsome disease;
- 3. Tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit;
 - Imputes to him impotence or want of chastity; or,
 - Which, by natural consequence, causes actual damage.

History: En. Sec. 33, Civ. C. 1895; re-en. Sec. 3603, Rev. C. 1907; re-en. Sec. 5691, R. C. M. 1921. Cal. Civ. C. Sec. 46. Field Civ. C. Sec. 30.

Complaint—Sufficiency

Where words in a complaint in an action for slander do not of themselves import a want of chastity, and no allegation is contained therein disclosing that they were used in a defamatory sense, a plea of justification in the answer, which denies the use of the words, will not remedy the defect. Daniel v. Moncure, 58 M 193, 190 P 983. Complaint in an action for slander

charging that defendant in the presence of other women said, of and concerning plaintiff, a married woman: "You are a wide whore" held sufficient, such words being actionable per se, and that it was not rendered insufficient by failure to

allege that plaintiff was present, no other reasonable inference being possible than that she was present. Kosonen v. Waara, 87 M 24, 32, 33, 285 P 668.

In the absence of an allegation of special damages the complaint in an action for slander is properly demurrable, unless the publication is slanderous per se. Tucker v. Wallace, 90 M 359, 364, 3 P 2d 404.

In an action for slander by the lessee of farm lands against the lessor, the complaint charging that the lessor's agent, through whom the lease negotiations had been carried on, had stated to one B. that he doubted that plaintiff could go through with the lease and that, if he was going to fall down, it would be better for plaintiff to give it up in the spring, rather than wait until fall, thus causing less loss for both, held insufficient to allege slander per se for failure to aver that B. was in a position to injure plaintiff's business, or set forth the place where the statement was made. Tucker v. Wallace, 90 M 359, 364, 3 P 2d 404.

In suit for slander, complaint which did not allege words slanderous per se or any special damage, held subject to general demurrer. Keller v. Safeway Stores, Inc., 15 F Supp 716, 724.

Injury to Business

In a case of slander alleged to have injured plaintiff in his business, it is important to show where the statement was made and that the person to whom it was made was in a position to injure his business. Tucker v. Wallace, 90 M 359, 364, 3 P 2d 404.

Publication

While, before recovery of damages in a slander action is permissible, it must appear that at least one person of those who heard the defamatory statement knew that plaintiff was meant, since otherwise there would be no publication and therefore no slander, plaintiff is not required to so allege in the complaint but may prove such fact under the general allegation authorized by section 93-3812 (since repealed), that the enactment was made of and concerning plaintiff. Kosonen v. Waara, 87 M 24, 32, 33, 285 P 668.

As distinguished from libel, which may be published to all the world, the spoken word in slander reaches only those to whom it is directed; hence, liability for slander attaches only to the initial publication and the offender is not liable for its repetition, unless he requests or intends that it be repeated. Tucker v. Wallace, 90 M 359, 364, 3 P 2d 404.

Slander Per Se

To constitute slander per se, the objectionable statement of or concerning plaintiff must be susceptible of but one meaning; hence, a publication which requires innuendo to demonstrate wherein it is slanderous, cannot be slanderous per se. Tucker v. Wallace, 90 M 359, 364, 3 P 2d 404.

To constitute slander (or libel) per se, the published statement of, or concerning the plaintiff must be susceptible of but one meaning; hence a publication which requires innuendo cannot be slanderous per se. Liebel v. Montgomery Ward & Co., 103 M 370, 381, 62 P 2d 667.

In action by legal stenographer against mercantile establishment because its employee said in hearing of others, "Your credit is no good; you don't pay your bills; you owe too many bills in town," held not slanderous per se within the meaning of this section, such words in no manner having reflected upon her skill or ability as a stenographer because credit

was not vital in her occupation such as in the business of a merchant or trader. Liebel v. Montgomery Ward & Co., 103 M 370, 381, 62 P 2d 667.

Special Damages

Where in a slander action it was not shown that defendants intended that the words spoken should be repeated and the persons present were plaintiff's sister-inlaw and an intimate friend, presumably disinclined to do anything to injure plaintiff, attempted proof of special damages because her employer discharged her on account of the slander, and that she was prevented on account thereof from securing employment, held, insufficient. Liebel v. Montgomery Ward & Co., 103 M 370, 386, 62 P 2d 667.

Subd. 1, Words Charging Commission of Crime

To constitute the false charging of a person with crime slander per se, it is not necessary that the charge be made with the technical accuracy of an information or indictment, but it may impliedly be so plain that it can have only one meaning to the bystander, to wit, that the person of whom they were spoken was charged with the commission of a crime. Keller v. Safeway Stores, Inc., 111 M 28, 31, 108 P 2d 605.

In an action for damages against a store and its employee for slander alleging that the employee in the presence of plaintiff's mother spoke the following words, "She (speaking of plaintiff) cashed a check at the Safeway Store and ordered a sack of flour sent to an address where there was no house and received change for the check. The check was no good and if you (referring to the mother) don't have her come down and see me, we will have the sheriff after her." Such words charged plaintiff with obtaining money under false pretenses or on a worthless check, and hence were slander per se. Keller v. Safeway Stores, Inc., 111 M 28, 31, 108 P 2d 605.

Words charging crime are "slanderous per se" even though they do not charge crime which would justify indictment or punishment for crime of felony grade (94-112); words charging that plaintiff cashed check which was no good, received change, and had flour sent to address where there was no house, threatening to have sheriff sent after plaintiff and identifying plaintiff as one who passed check, held not slanderous per se, since they did not charge crime and were not susceptible of only opprobrious meaning and general demurrer was sustained to complaint; words are not slanderous per se where their injurious character appears only in consequence of extrinsic circumstances and

not from words themselves in their usual signification. Keller v. Safeway Stores, Inc., 15 F Supp 716, 720.

Collateral References

For pertinent Am. Jur. and ALR references, see § 64-203, ante.

References

Fowlie v. Cruse, 52 M 222, 232, 157 P 958.

64-205. Liability of owner of radio station—libel. No person, firm, or corporation owning or operating a radio broadcasting station shall be liable under the law of libel and defamation on account of having made its broadcasting facilities available to any person, whether a candidate for public office or any other person, for discussion of controversial or any other subjects, in the absence of proof of actual malice on the part of such owner or operator.

History: En. Sec. 1, Ch. 122, L. 1939.

Collateral References

Libel and Slander © 34. 53 C.J.S. Libel and Slander § 87. Broadcasting company's liability for defamatory statement by one not in its employ during broadcast. 5 ALR 2d 957. Libel or slander in television transmission. 15 ALR 2d 794.

64-206. Submission of copy of address. Any person, firm or corporation owning or operating a radio broadcasting station shall have the right, but shall not be compelled, to require the submission and permanent filing, in such station, of a copy of the complete address, or other form of expression, if in words, intended to be broadcast over such station, not more than 48 hours before the time of the intended broadcast thereof.

History: En. Sec. 2, Ch. 122, L. 1939.

Collateral References

Telegraph and Telephone \$\infty\$25½, 29. 86 C.J.S. Telegraphs, Telephones, Radio, and Television § 296.

64-207. Construction of act—liability for libel. Nothing in this act contained shall be construed to relieve any person broadcasting over a radio station from liability under the law of libel and defamation. Nor shall anything in this act be construed to relieve any person, firm or corporation owning or operating a radio broadcasting station from liability under the law of libel and defamation on account of any broadcast prepared or made by any such person, firm or corporation or by any officer or employee thereof in the course of his employment; and in any case where liability shall exist on account of any broadcast as declared in the first clause of this sentence, in that event where two or more broadcasting stations were connected together simultaneously or by transcription, film, metal tape or other approved or adapted use for joint operation, in the making of such broadcast, such liability shall be confined and limited solely to the person, firm or corporation owning or operating the radio station which originated such broadcast.

History: En. Sec. 3, Ch. 122, L. 1939.

64-207.1. Notice in writing to publisher of libelous or defamatory matter—opportunity to correct—defense and mitigation of damages. Before any civil action shall be commenced on account of any libelous or defamatory publication in any newspaper, magazine, periodical, radio or television station, the libeled person shall first give those alleged to be

responsible or liable for the publication a reasonable opportunity to correct the libelous or defamatory matter. Such opportunity shall be given by notice in writing specifying the article and the statements therein which are claimed to be false and defamatory and a statement of what are claimed to be the true facts. The notice may also state the sources, if any, from which the true facts may be ascertained with definiteness and certainty. The first issue of a newspaper, magazine or periodical published after the expiration of one week from the receipt of such notice shall be within a reasonable time for correction. In the case of radio and television stations, a broadcast made at the same time of day as the broadcast complained of and of at least equal duration, which is made within seven (7) days following receipt of such notice shall be within a reasonable time for correction. To the extent that the true facts are, with reasonable diligence, ascertainable with definiteness and certainty, only a retraction shall constitute a correction; otherwise the publication of the libeled person's statement of the true facts, or so much thereof as shall not be libelous of another, scurrilous, or otherwise improper for publication, published as his statement, shall constitute a correction within the meaning of this section. If it shall appear upon trial that the publication was made under honest mistake or misapprehension, then a correction, timely published, without comment, in a position and type as prominent as the alleged libel, or in a broadcast made at the same time of day as the broadcast complained of and of at least equal duration, shall constitute a defense against the recovery of any damages except actual damages, as well as being competent and material in mitigation of actual damages to the extent the correction published does so mitigate them.

History: En. Sec. 1, Ch. 159, L. 1961.

64-208. (5692) What communications are privileged. A privileged publication is one made:

- 1. In the proper discharge of an official duty;
- 2. In any legislative or judicial proceeding, or in any other official proceeding authorized by law;
- 3. In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information:
- 4. By a fair and true report, without malice, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof.

History: En. Sec. 34, Civ. C. 1895; re-en. Sec. 3604, Rev. C. 1907; re-en. Sec. 5692, R. C. M. 1921. Cal. Civ. C. Sec. 47. Based on Field Civ. C. Sec. 31.

Communications Not Privileged

The publication of a story of inhuman treatment of children by their mother, gathered by a reporter from gossip heard by him in the sheriff's office, prior to the institution of any proceeding in court, was not privileged. Kelly v. Independent

Publishing Co., 45 M 127, 136, 122 P 735.

By making the slanderous statement in

By making the slanderous statement in the presence of a stranger, defendant removed the bar of privilege otherwise attending communications made by him to his agents only, which might have protected him, in the absence of actual malice. Fowlie v. Cruse, 52 M 222, 236, 157 P 958.

A communication addressed by taxpayers to the board of county commissioners asking for the removal of a road super-

visor and containing a libelous statement was not privileged under this section, subdivision 3, where made with malice. Manley v. Harer, 73 M 253, 263, 235 P 757.

In an action for libel, a letter sent by the manager of a coal mining company to the industrial accident board, relative to one of its employees, allegedly with the purpose of prejudicing such employee with reference to a claim then pending before the board, with the intent of impliedly charging him with malingering and pretending to have been injured when in fact he was not, and with having made other fraudulent claims against the employer, not relevant or material to the issue then before the board, was not privileged under this section, and if false and malicious, was actionable. Magelo v. Roundup Coal Mining Co., 109 M 293, 300, 96 P 2d 932.

Communications Privileged

Under the law of libel, the publication of a petition signed by taxpayers containing charges against a public officer or employee of a violation of his obligations to the financial detriment of the county, and asking for his removal, is privileged unless made with malice, even though the statements contained therein are false. Manley v. Harer, 82 M 30, 35, 264 P 937.

Under this section, a publication of a public official proceeding or of anything said in the course thereof is privileged, if it is a fair and true report made without malice. Griffin v. Opinion Publishing Co., 114 M 502, 511, 138 P 2d 580.

Effect of Malice

In order to found liability for libel upon a communication prima-facie privileged, actual and not implied malice must be shown. Such was the rule at common law, and such must necessarily be the rule under the statute. Cooper v. Romney, 49 M 119, 127, 141 P 289.

A complaint alleging that a libelous publication was false and malicious alleges in substance that it was false and unprivileged, since, in case of malice, the privilege conferred by subdivisions 3 and 4 of this section does not exist. Cooper v. Romney, 49 M 119, 127, 141 P 289.

Striking Opinion of Justice from Records

On motion of counsel for appellant filed in their own behalf and that of their client to strike from the files of the court a special opinion of a justice concurring in the affirmance of the judgment appealed from, on the ground that statements therein were scandalous, scurrilous and defamatory, ordered that such opinion be expunged from the court records and not published in the reports of its

decisions. Nadeau v. Texas Co., 104 M 558, 575, 69 P 2d 586, 593.

When a Court or Jury Question

The question whether an alleged libelous publication was privileged, either absolutely or conditionally by reason of its character or the occasion upon which it was made, is a question of law for the trial court's decision whenever the evidence is undisputed, it being only when the evidence is conflicting that the question is to be submitted to the jury. Griffin v. Opinion Publishing Co., 114 M 502, 511, 138 P 2d 580.

When Both Falsity and Malice Must Be Shown

Where the communication appears to have been privileged, the plaintiff must show, not only actual malice, but falsity in the publication. Cooper v. Romney, 49 M 119, 128, 141 P 289.

References

Tucker v. Wallace, 90 M 359, 364, 3 P 2d 404.

Collateral References

Libel and Slander 34-51.

53 C.J.S. Libel and Slander §§ 87, 88, 97, 102, 107, 123, 125.

33 Am. Jur. 123, Libel and Slander, §§ 124-190.

For pertinent ALR annotations, see § 64-203, ante.

Privilege of communications or reports between liability or indemnity insurer and insured. 22 ALR 2d 659.

Matters to which the privilege covering communications to clergyman or spiritual adviser extends. 22 ALR 2d 1152.

Construction and effect of statute removing or modifying, in personal injury actions, patient's privilege against disclosure by physician. 25 ALR 2d 1429.

Statements or utterances by member of governing body of political subdivision, in course of official proceedings, as privileged. 40 ALR 2d 941.

Findings, reports, or the like, of persons acting in judicial capacity, as privileged. 42 ALR 2d 825.

Privilege as a defense to an action for libel or slander based on statements respecting race, color, or nationality. 46 ALR 2d 1305.

Proceedings, presentments, investigations, and reports of grand jury as privileged. 48 ALR 2d 716.

Testimony of witness at nonjudicial proceeding as basis of civil action for slander. 54 ALR 2d 1309.

Liability of insurance company for libel or slander by its agent or employee as affected by doctrine of privilege. 55 ALR 2d 846.

Acts, gestures, pantomime or the like as constituting privileged communication, 71 ALR 2d 812.

Privilege of statements made in lunacy

or other judicial proceeding by physician, surgeon, or nurse concerning patient. 73 ALR 2d 333.

Privilege in connection with proceedings to disbar or discipline attorney. 77 ALR

2d 493.

64-209. (5693) **Protection of personal relations.** The rights of personal relations forbid:

- 1. The abduction of a husband from his wife, or of a parent from his child;
- 2. The abduction or enticement of a wife from her husband, of a child from a parent or from a guardian entitled to its custody, or of a servant from his master;
 - 3. The seduction of a wife, daughter, orphan sister, or servant;
 - 4. Any injury to a servant which affects his ability to serve his master.

History: En. Sec. 35, Civ. C. 1895; re-en. Sec. 3605, Rev. C. 1907; re-en. Sec. 5693, R. C. M. 1921. Cal. Civ. C. Sec. 49. Field Civ. C. Sec. 32.

Collateral References

Abduction 19 et seq.; Husband and Wife 323-325 et seq.; Master and Servant 336-339 et seq.; Parent and Child 18 et seq.; Seduction 1-8.

1 C.J.S. Abduction § 37; 42 C.J.S. Husband and Wife §§ 660-668, 670-672, 678, 679, 681, 682; 57 C.J.S. Master and Servant § 622; 67 C.J.S. Parent and Child § 100 et seq.; 79 C.J.S. Seduction §§ 1 et seq., 8 et seq.

30 Am. Jur. 85, Interference, §§ 37 et seq.; 39 Am. Jur. 713, Parent and Child,

§§ 71 et seq. See generally, 42 Am. Jur. 259, Prostitution; 47 Am. Jur. 627, Seduction.

Promise of marriage as condition of civil action for seduction. 21 ALR 303.

Subsequent intermarriage of parties, forgiveness, compromise, etc., as defense to prosecution for seduction. 80 ALR 833.

Liability for procuring breach of contract. 84 ALR 43 and 26 ALR 2d 1227.

Right of seduced female to maintain action for seduction. 121 ALR 1487.

Constitutionality, construction, and application of statutes denouncing offense of interfering with or molesting mechanic or laborer. 123 ALR 316.

64-210. (5694) **Right to use force.** Any necessary force may be used to protect from wrongful injury the person or property of one's self, or of a wife, husband, child, parent, or other relative, or member of one's family, or of a ward, servant, master, or guest.

History: En. Sec. 36, Civ. C. 1895; re-en. Sec. 3606, Rev. C. 1907; re-en. Sec. 5694, R. C. M. 1921. Cal. Civ. C. Sec. 50. Based on Field Civ. C. Sec. 33.

Burden on Plaintiff to Prove Excess, Not on Defendant to Justify the Means

Where plaintiff and her husband were trespassers upon the property of the defendant and at least contributed to provoke an alleged assault for which damages were sought, the burden was upon them to prove that the force used by defendant in repelling it was excessive, and therefore an instruction that the burden rested upon defendant to justify the means employed in trying to evict the plaintiff, was erroneous. Vaughn v. Mesch, 107 M 498, 510, 87 P 2d 177, 123 ALR 1106.

Excessive Force — Provocation — Exemplary Damages

While it is a sound rule that exemplary damages are not recoverable in an assault case where provocation furnished by the plaintiff affords a reasonable excuse for the assault, the rule that if defendant uses excessive or unwarranted force in repelling the aggressor, such damages may be awarded is equally well settled. Vaughn v. Mesch, 107 M 498, 507, 87 P 2d 177, 123 ALR 1106.

Malice—Test for Awarding Exemplary Damages

In an assault case where malice is alleged it is not the quantum of force used but whether the assailant was in a malicious state of mind which is the test

in awarding exemplary damages; the use of a dangerous weapon (a hammer) is some evidence of a wanton disregard of human life and generally gives rise to such damages; the question of malice is generally one for the jury. Vaughn v. Mesch, 107 M 498, 508, 87 P 2d 177, 123 ALR 1106.

Right to Kill Game in Defense of Person or Property

On appeal from a conviction of killing an elk out of season, the defense was predicated upon Art. III, secs. 3, 13 and 29 of the Constitution; held, under the facts presented, that legal justification may always be interposed as a defense by a person charged with killing a wild animal contrary to law, and that the general law on the right to use force, this section, must be construed in pari materia with section 26-307 when the latter is found inoperative, otherwise the latter section would be unconstitutional as denying an unalienable right. Cause was reversed and remanded for a new trial. State v. Rathbone, 110 M 225, 237, 100 P 2d 86.

Collateral References

Assault and Battery 13-15, 67-69 et seq.; Homicide 109-124.

6 C.J.S. Assault and Battery §§20-22, 72, 78, 79; 40 C.J.S. Homicide § 114 et seq.

64-211. Discrimination on grounds of race, color, or creed in places of public accommodation or amusement prohibited. No person, partnership, corporation, association or organization owning or managing any place of public accommodation or amusement shall discriminate against any person or group of persons solely on the ground of race, color or creed.

History: En. Sec. 1, Ch. 240, L. 1955.

64-212. Merchant, premises and merchandise defined. The term "merchant" as used herein shall mean an owner or operator, and the agent, consignee, employee, lessee, or officer of an owner or operator, of any merchant's premises. The term "premises" shall mean any establishment or part thereof wherein merchandise is displayed, held or offered for sale. The term "merchandise" shall mean any personal property, capable of manual delivery, displayed, held or offered for sale by a merchant.

History: En. Sec. 1, Ch. 11, L. 1957.

64-213. Right of merchant to request individuals to keep merchandise in full view—freedom from liability. Any merchant shall have the right to request any individual on his premises to place or keep in full view any merchandise such individual may have removed, or which the merchant has reason to believe he may have removed, from its place of display or elsewhere, whether for examination, purchase, or for any other purpose. No merchant shall be criminally or civilly liable for slander, false arrest, or otherwise on account of having made such a request.

History: En. Sec. 2, Ch. 11, L. 1957.

TITLE 65

PLEDGES AND TRUST RECEIPTS

Pledge, 65-101 to 65-126.

Uniform Trust Receipts Act, 65-201 to 65-219.

CHAPTER 1

PLEDGE

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65-101. (8292) Pledge defined. Pledge is a deposit of personal property by way of security for the performance of another's act.

History: En. Sec. 3890, Civ. C. 1895; re-en. Sec. 5774, Rev. C. 1907; re-en. Sec. 8292, R. C. M. 1921. Cal. Civ. C. Sec. 2986. Field Civ. C. Sec. 1647.

Cross-Reference

Pawnbrokers, secs. 94-3701 to 94-3704.

Delivery of Property Essential

The elements made essential by this section and section 65-102 to the creation of a contract of pledge are a delivery of personal property by the owner to the pledgee under an agreement, express or implied, and with the intention by both parties, that the pledgee shall hold as security for the payment of a debt or the performance of some obligation. Brunswick-Balke-Collender Co. v. Higgins, 54 M 11, 15, 165 P 1109, distinguished in 80 M 468, 478, 260 P 1055.

The lien of a pledge is dependent on possession, and a pledge is therefore not valid until the property pledged is de-livered to the pledgee or to a pledge-holder. Goriez v. Rock Creek Ditch Co., 67 M 566, 571, 216 P 778.

Deposit as Guaranty of Use, Held a Pledge

Where a tenant of an estate was required to deposit a sum of money as a guaranty that the premises would not be used for unlawful purposes with consePLEDGE 65-103

quent abatement proceedings, the deposit amounted to a pledge to a return of which he was entitled on distribution of the estate and passing of title to the premises in question to one of the heirs, the contingency guaranteed against not having arisen. Ryan v. Stagg, 89 M 390, 392, 298 P 353.

Interest Belongs to Pledgor

A deposit in a bank to indemnify sureties on a bond against possible loss is a pledge within the definition of this section; title to it, as between the principal and the sureties, is in the former, and any interest accruing belongs to him, and not to the sureties. Leggat v. Palmer, 39 M 302, 308, 102 P 327.

Sale with Title in Seller until Full Payment Is Not Pledge

Where property is sold under a contract providing that title shall remain in the seller until the purchase price is paid, the seller does not have a mortgage, pledge, or lien upon the property within the attachment statute. State ex rel. Malin-Yates Co. v. Justice of Peace Court, 51 M 133, 139, 149 P 709.

What May Be Pledged

A lease of, or mortgage upon, real estate may be pledged; and there seems to be no difference in principle between the pledge of a lease and the pledge of a contract to purchase land. Ringling v. Smith River Development Co., 48 M 467, 476, 138 P 1098.

The interest that one has in a contract to purchase land, for which part payment has been made, and of which he has taken possession, may be pledged as collateral security for the payment of a note. Ringling v. Smith River Development Co., 48 M 467, 476, 138 P 1098.

The transaction by which collateral se-curity is delivered by the debtor and accepted by creditor constitutes a pledge. Averill Mach. Co. v. Bain, 50 M 512, 514, 148 P 334.

References

Durfee v. Harper, 22 M 354, 367, 56 P 582; Union Bank & Trust Co. v. Himmelbauer, 56 M 82, 91, 181 P 332; U. S. Gypsum Co. v. Mackey W. P. Co., 60 M 132, 146, 199 P 249.

Collateral References

Pledges = 1.

72 C.J.S. Pledges §§ 2, 5. 41 Am. Jur. 582, Pledge and Collateral Security, § 2.

Effectiveness, as pledge, of transfer of nonnegotiable instrument which represents obligation. 53 ALR 2d 1396.

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Montana Law and the Uniform Commercial Code, 21 Mont. L. Rev. 1, 103 (Fall

65-102. (8293) When contract is to be deemed a pledge. Every contract by which the possession of personal property is transferred, as security only, is to be deemed a pledge.

History: En. Sec. 3891, Civ. C. 1895; re-en. Sec. 5775, Rev. C. 1907; re-en. Sec. 8293, R. C. M. 1921. Cal. Civ. C. Sec. 2987. Field Civ. C. Sec. 1648.

References

Ringling v. Smith River Development Co., 48 M 467, 475, 138 P 1098; Averill Mach. Co. v. Bain, 50 M 512, 514, 148 P 334; Brunswick-Balke-Collender Co. v. Hig-534; Brunswick-Barke-Collender Co. V. Higgins, 54 M 11, 15, 165 P 1109; Union Bank & Trust Co. v. Himmelbauer, 56 M 82, 91, 181 P 332; U. S. Gypsum Co. v. Mackey W. P. Co., 60 M 132, 146, 199 P 249; Goriez v. Rock Creek Ditch Co., 67 M 566, 571, 216 P 778; Ryan v. Stagg, 89 M 390, 392, 298 P 353.

65-103. (8294) Delivery essential to validity of pledge. The lien of a pledge is dependent on possession, and no pledge is valid until the property pledged is delivered to the pledgee, or to a pledge-holder, as hereafter prescribed.

History: En. Sec. 3892, Civ. C. 1895; re-en. Sec. 5776, Rev. C. 1907; re-en. Sec. 8294, R. C. M. 1921. Cal. Civ. C. Sec. 2988. Field Civ. C. Sec. 1649.

Constructive Delivery

Constructive delivery of accounts by a debtor to a creditor for purpose of collection is sufficient to satisfy the rule that a pledge is dependent on possession of the thing pledged. Savage Tire Sales Co. v. Stuart, 61 M 524, 528, 203 P 364.

Pledgor Deemed Trustee of Securities under Certain Circumstances

While under this section, the lien of a pledge is dependent on possession in the pledgee, he may entrust the article pledged to the pledgor for a special purpose, in which event the latter holds it as trustee

for the pledgee; therefore where the pledgee of securities of a bank delivered to him by it while a going concern turned them over to its receiver for the purpose of endorsing collections thereon, which were placed to the receivers credit as trustee for the owner, the claim that the pledgee lost his right to the pledged property is without merit. Ainsworth v. Kruger, 80 M 468, 478, 260 P 1055.

References U. S. Gypsu:

U. S. Gypsum Co. v. Mackey W. P. Co., 60 M 132, 146, 199 P 249.

Collateral References

Pledges ₹ 11, 12.
72 C.J.S. Pledges § 19.
41 Am. Jur. 592, Pledge and Collateral
Security, §§ 13 et seq.

65-104. (8295) Increase of thing. pledged with the property.

History: En. Sec. 3893, Civ. C. 1895; re-en. Sec. 5777, Rev. C. 1907; re-en. Sec. 8295, R. C. M. 1921. Cal. Civ. C. Sec. 2989. Field Civ. C. Sec. 1650.

The increase of property pledged is

did not cover their calves, in gestation at the time of the execution of the mortgage, but born prior to foreclosure. Demers v. Graham, 36 M 402, 408, 93 P 268.

Operation and Effect

A chattel mortgage upon cows, in which no mention was made of their increase,

Collateral References

Pledges \$22. 72 C.J.S. Pledges § 24.

65-105. (8296) Lienor may pledge property to extent of his lien. One who has a lien upon property may pledge it to the extent of his lien.

History: En. Sec. 3894, Civ. C. 1895; re-en. Sec. 5778, Rev. C. 1907; re-en. Sec. 8296, R. C. M. 1921. Cal. Civ. C. Sec. 2990. Field Civ. C. Sec. 1651.

Collateral References

Pledges € 6. 72 C.J.S. Pledges § 8.

65-106. (8297) Real owner cannot defeat pledge of property transferred to apparent owner for the purpose of pledge. One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title to defeat a pledge of the property, made by the other to a pledgee who received the property in good faith, in the ordinary course of business, and for value.

History: En. Sec. 3895, Civ. C. 1895; re-en. Sec. 5779, Rev. C. 1907; re-en. Sec. 8297, R. C. M. 1921. Cal. Civ. C. Sec. 2991. Field Civ. C. Sec. 1652.

Cross-References

Attachment of pledged property, sec. 93-4339.

Execution on pledged property, sec. 93-5811.

Return of Corporate Stock Where the owner of corpor

Where the owner of corporate stock had delivered it to one for the purpose of being turned over to persons entitled thereto upon the happening of a certain event, and not for the purpose "of making a transfer thereof" within the meaning of this section, and the bailee pledged it instead to plaintiff in an action to foreclose the pledge who was fully conversant with the facts and the respective rights of the parties in the transaction and was therefore not a holder in good faith, the court properly decreed return of the stock to its owner. Vinson v. Pelletier, 78 M 254, 268, 255 P 1067.

Assumption of Apparent Ownership

This section has no application where the apparent ownership is permitted to be assumed for any purpose other than that of transfer or sale, and applies then only if the pledgee received the property in good faith and for value. Vinson v. Pelletier, 78 M 254, 268, 255 P 1067.

Collateral References

Estoppel \$75; Pledges \$24. 31 C.J.S. Estoppel \$ 106; 72 C.J.S. Pledges \$ 26.

65-107. (8298) **Pledge-lender defined.** Property may be pledged as security for the obligation of another person than the owner, and in so doing, the owner has all the rights of the pledgor for himself, except as hereinafter stated.

History: En. Sec. 3896, Civ. C. 1895; re-en. Sec. 5780, Rev. C. 1907; re-en. Sec. 8298, R. C. M. 1921. Cal. Civ. C. Sec. 2992. Field Civ. C. Sec. 1653.

Pledgor Becomes Surety

The owner of property who pledges it as security for the obligation of another person becomes a surety, and as such is discharged from liability where the creditor, without the pledgor's consent, alters the terms of the original obligation or in anywise impairs or suspends any remedies he may have against the principal. Vinson v. Pelletier, 78 M 254, 255 P 1067.

References

Maser v. Farmers' & Merchants' Bank of Winnett, 90 M 33, 38, 300 P 207.

65-108. (8299) **Pledge-holder defined.** A pledgor and pledgee may agree upon a third person with whom to deposit the property pledged, who, if he accepts the deposit, is called a pledge-holder.

History: En. Sec. 3897, Civ. C. 1895; re-en. Sec. 5781, Rev. C. 1907; re-en. Sec. 8299, R. C. M. 1921. Cal. Civ. C. Sec. 2993. Field Civ. C. Sec. 1654.

Operation and Effect

Where a bank accepts a special deposit as a pledge to secure the return of borrowed personal property by the pledgor to a third person, it becomes a pledgeholder within the meaning of this section burdened with the duties and obligations of a depositary. Maser v. Farmers' & Merchants' Bank of Winnett, 90 M 33, 38, 300 P 207.

References

Goriez v. Rock Creek Ditch Co., 67 M 566, 571, 216 P 778.

Collateral References

Escrows 1 et seq.; Pledges 26. 30 C.J.S. Escrows 2 et seq.; 72 C.J.S. Pledges 29.

65-109. (8300) When pledge-lender may withdraw property pledged. One who pledges property as security for the obligation of another cannot withdraw the property pledged otherwise than as a pledgor for himself might, and if he receives from the debtor a consideration for the pledge, he cannot withdraw it without his consent.

History: En. Sec. 3898, Civ. C. 1895; re-en. Sec. 5782, Rev. C. 1907; re-en. Sec. 8300, R. C. M. 1921. Cal. Civ. C. Sec. 2994. Field Civ. C. Sec. 1655.

Collateral References

Pledges@=47. 72 C.J.S. Pledges § 47.

65-110. (8301) **Obligations of pledge-holder.** A pledge-holder for reward cannot exonerate himself from his undertaking; and a gratuitous pledge-holder can do so only by giving reasonable notice to the pledgor and pledgee to appoint a new pledge-holder, and in case of their failure to agree, by depositing the property pledged with some impartial person, who will then be entitled to a reasonable compensation for his care of the same.

History: En. Sec. 3899, Civ. C. 1895; re-en. Sec. 5783, Rev. C. 1907; re-en. Sec. 8301, R. C. M. 1921. Cal. Civ. C. Sec. 2995. Field Civ. C. Sec. 1656.

References

Gilna v. Fidelity & Deposit Co., 83 M 231, 239, 272 P 540.

65-111. (8302) Pledge-holder must enforce rights of pledgee. A pledge-holder must enforce all the rights of the pledgee, unless authorized by him to waive them.

History: En. Sec. 3900, Civ. C. 1895; 8302, R. C. M. 1921. Cal. Civ. C. Sec. 2996. re-en. Sec. 5784, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1657.

65-112. (8303) Obligations of pledgee and pledge-holder for reward. A pledgee, or a pledge-holder for reward, assumes the duties and liabilities of a depositary for reward.

History: En. Sec. 3901, Civ. C. 1895; re-en. Sec. 5785, Rev. C. 1907; re-en. Sec. 8303, R. C. M. 1921. Cal. Civ. C. Sec. 2997. Field Civ. C. Sec. 1658.

Collateral References

Escrows 3; Pledges 28 et seq. 30 C.J.S. Escrows § 7; 72 C.J.S. Pledges

65-113. (8304) Gratuitous pledge-holder. A gratuitous pledge-holder assumes the duties and liabilities of a gratuitous depositary.

History: En. Sec. 3902, Civ. C. 1895; re-en. Sec. 5786, Rev. C. 1907; re-en. Sec. 8304, R. C. M. 1921. Cal. Civ. C. Sec. 2998. Field Civ. C. Sec. 1659.

References

Maser v. Farmers' & Merchants' Bank of Winnett, 90 M 33, 38, 300 P 207.

(8305) Debtor's misrepresentation of value of pledge. Where a debtor has obtained credit, or an extension of time, by a fraudulent misrepresentation of the value of property pledged by or for him, the creditor may demand a further pledge to correspond with the value represented; and in default thereof may recover his debt immediately, though it be not actually due.

History: En. Sec. 3903, Civ. C. 1895; re-en. Sec. 5787, Rev. C. 1907; re-en. Sec. 8305, R. C. M. 1921. Cal. Civ. C. Sec. 2999. Field Civ. C. Sec. 1660.

Collateral References

Pledges 53. 72 C.J.S. Pledges § 52.

65-115. (8306) When pledgee may sell. When performance of the act for which a pledge is given is due, in whole or in part, the pledgee may collect what is due to him by a sale of property pledged, subject to the rules and exceptions hereinafter prescribed.

History: En. Sec. 3904, Civ. C. 1895; re-en. Sec. 5788, Rev. C. 1907; re-en. Sec. 8306, R. C. M. 1921. Cal. Civ. C. Sec. 3000. Field Civ. C. Sec. 1661.

wick-Balke-Collender Co. v. Higgins, 54 M 11, 15, 165 P 1109.

Operation and Effect

An agreement of pledge need not be in writing; it may be express or implied; but it must be clear that it was the intention of each of the parties that the property be held as a security. Bruns-

References

Evankovich v. Howard Pierce, Inc., 91 M 344, 352, 8 P 2d 653.

Collateral References

Pledges 56. 72 C.J.S. Pledges § 57. 41 Am. Jur. 640, Pledge and Collateral Security, §§ 78 et seq.

65-116. (8307) When pledgee must demand performance. Before property pledged can be sold, and after performance of the act for which it is security is due, the pledgee must demand performance thereof from the debtor, if the debtor can be found.

History: En. Sec. 3905, Civ. C. 1895; re-en. Sec. 5789, Rev. C. 1907; re-en. Sec. 8307, R. C. M. 1921. Cal. Civ. C. Sec. 3001. Based on Field Civ. C. Sec. 1662.

Operation and Effect

Where a note is secured by a mortgage on personal property, the parties have a right to stipulate for a sale of such property, whenever the mortgagee deems him-self insecure, and for the mortgagee at his option to declare the debt due, though prior to the due date of the note; and, where this is done, and an action is brought for a balance due, the complaint is sufficient where it alleges that the property was so sold, though it does not allege that the plaintiff made demand for payment of the note, or allege that he gave defendant notice of the time and place of sale; the circumstances did not change the mortgagee into a pledgee. Union Bank & Trust Co. v. Himmelbauer, 56 M 82, 92, 181 P 332, explained in 88 M 479, 484, 293

Where the buyer of a used car was given a reasonable time within which to make his initial payment, the dealer, before reselling it, was under this section required to make demand of the buyer for payment, and where no such demand was made before resale, the buyer's subsequent

offer to make payment was timely, and the seller was guilty of breach of con-tract. Evankovich v. Howard Pierce, Inc., 91 M 344, 352, 8 P 2d 653.

Collateral References

Pledges 56(3). 72 C.J.S. Pledges § 58.

65-117. (8308) Notice of sale to pledger. A pledgee must give actual notice to the pledgor of the time and place at which the property pledged will be sold, at such a reasonable time before the sale as will enable the pledgor to attend.

History: En. Sec. 3906, Civ. C. 1895; re-en. Sec. 5790, Rev. C. 1907; re-en. Sec. 8308, R. C. M. 1921. Cal. Civ. C. Sec. 3002. Field Civ. C. Sec. 1663.

vich v. Howard Pierce, Inc., 91 M 344. 352, 8 P 2d 653.

References

Union Bank & Trust Co. v. Himmelbauer, 56 M 82, 92, 181 P 332; Evanko-

Collateral References

Pledges©=56(4). 72 C.J.S. Pledges § 59. 41 Am. Jur. 643, Pledge and Collateral Security, § 83.

65-118. (8309) Waiver of notice of sale. Notice of sale may be waived by a pledgor at any time; but is not waived by a mere waiver of demand of performance.

History: En. Sec. 3907, Civ. C. 1895; re-en. Sec. 5791, Rev. C. 1907; re-en. Sec.

8309, R. C. M. 1921. Cal. Civ. C. Sec. 3003. Field Civ. C. Sec. 1664.

65-119. (8310) Waiver of demand. A debtor or pledgor waives a demand of performance as a condition precedent to a sale of the property pledged, by a positive refusal to perform, after performance is due; but cannot waive it in any other manner except by contract.

History: En. Sec. 3908, Civ. C. 1895; re-en. Sec. 5792, Rev. C. 1907; re-en. Sec. 8310, R. C. M. 1921. Cal. Civ. C. Sec. 3004. Field Civ. C. Sec. 1665.

Collateral References

Pledges 56(3). 72 C.J.S. Pledges § 58.

65-120. (8311) Sale must be by auction. The sale by a pledgee of property pledged must be made by public auction, in the manner and upon the notice to the public usual at the place of sale, in respect to auction sales of similar property; and must be for the highest obtainable price.

History: En. Sec. 3909, Civ. C. 1895; re-en. Sec. 5793, Rev. C. 1907; re-en. Sec. 8311, R. C. M. 1921. Cal. Civ. C. Sec. 3005. Field Civ. C. Sec. 1666.

Evankovich v. Howard Pierce, Inc., 91 M 344, 353, 8 P 2d 653.

Collateral References

Pledges€=56(5). 72 C.J.S. Pledges § 60. 41 Am. Jur. 645, Pledge and Collateral Security, § 84.

What constitutes a "public sale." 4 ALR 2d 575.

65-121. (8312) Pledgee's sale of securities. A pledgee may sell, in accordance with the provisions of this chapter, any evidence of debt or he may collect the same when due.

History: En. Sec. 3910, Civ. C. 1895; re-en. Sec. 5794, Rev. C. 1907; re-en. Sec. 8312, R. C. M. 1921; amd. Sec. 1, Ch. 102, L. 1941. Cal. Civ. C. Sec. 3006. Field Civ. C. Sec. 1667.

Operation and Effect

Under this section, held that where a bank had pledged to another bank promissory notes owned by it, as security for

indebtedness due, the latter bank was without authority to sell the collateral upon insolvency of the former, but was bound to hold and collect it when due and apply the proceeds to the payment of the debt secured. State v. American Bank & Trust Co., 76 M 445, 448, 247 P 336; Springhorn v. Roberts, 77 M 395, 398, 250

Under this section, a pledgee may sue in

his own name upon a negotiable promissory note transferred before maturity as collateral security. National Park Bank of N. Y. v. American Brewing Co., 79 M 542, 547, 257 P 436.

References

Savage Tire Sales Co. v. Stuart, 61 M 524, 528, 203 P 364; State v. Yellowstone

Bank etc. Co., 75 M 43, 47, 243 P 813; National Bank v. American Brewing Co., 79 M 605, 610, 257 P 1043.

Collateral References

Pledges ≈ 29, 30(1), 56(1).
72 C.J.S. Pledges §§ 34, 57, 68.
41 Am. Jur. 640, Pledge and Collateral Security, §§ 78 et seq.

65-122. (8313) Sale on demand of the pledgor. Whenever property pledged can be sold for a price sufficient to satisfy the claims of the pledgee, the pledgor may require it to be sold, and its proceeds to be applied to such satisfaction, when due.

History: En. Sec. 3911, Civ. C. 1895; re-en. Sec. 5795, Rev. C. 1907; re-en. Sec. 8313, R. C. M. 1921. Cal. Civ. C. Sec. 3007. Field Civ. C. Sec. 1668.

Collateral References Pledges©⇒30(3). 72 C.J.S. Pledges § 68.

65-123. (8314) Surplus to be paid to pledgor. After a pledgee has lawfully sold property pledged, or otherwise collected its proceeds, he may deduct therefrom the amount due under the principal obligation, and the necessary expenses of sale and collection, and must pay the surplus to the pledgor on demand.

History: En. Sec. 3912, Civ. C. 1895; re-en. Sec. 5796, Rev. C. 1907; re-en. Sec. 8314, R. C. M. 1921. Cal. Civ. C. Sec. 3008. Field Civ. C. Sec. 1669.

References

State v. American Bank & Trust Co., 76 M 445, 449, 247 P 336.

Collateral References

Pledges 59.
72 C.J.S. Pledges § 78.

65-124. (8315) Pledgee may retain. When property pledged is sold by order of the pledger before the claim of the pledgee is due, the latter may retain out of the proceeds all that can possibly become due under his claim until it becomes due.

History: En. Sec. 3913, Civ. C. 1895; 8 re-en. Sec. 5797, Rev. C. 1907; re-en. Sec. 1

8315, R. C. M. 1921. Cal. Civ. C. Sec. 3009. Based on Field Civ. C. Sec. 1670.

65-125. (8316) **Pledgee's purchase of property pledged.** A pledgee, or pledge-holder, cannot purchase the property pledged, except by direct dealing with the pledgor.

History: En. Sec. 3914, Civ. C. 1895; re-en. Sec. 5798, Rev. C. 1907; re-en. Sec. 8316, R. C. M. 1921. Cal. Civ. C. Sec. 3010. Field Civ. C. Sec. 1671.

Collateral References

Pledges ₹ 56(6).
72 C.J.S. Pledges § 61.
41 Am. Jur. 649, Pledge and Collateral Security, § § 90 et seq.

Purchase by pledgee of subject of pledge as conversion. 37 ALR 2d 1386, 1393.

Law Review

Montana Law and the Uniform Commercial Code, 21 Mont. L. Rev. 1, 103 (Fall 1959).

65-126. (8317) Pledgee may foreclose right of redemption. Instead of selling property pledged, as hereinbefore provided, a pledgee may foreclose the right of redemption by a judicial sale, under the direction of a competent court; and in that case may be authorized by the court to purchase at the sale.

History: En. Sec. 3915, Civ. C. 1895; 8317, R. C. M. 1921. Cal. Civ. C. Sec. 3011. re-en. Sec. 5799, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1672.

Collateral References

Pledges 57.

72 C.J.S. Pledges § 67. 41 Am. Jur. 647, Pledge and Collateral Security, §§ 88, 89.

Montana Law and the Uniform Commercial Code, 21 Mont. L. Rev. 1, 103 (Fall 1959).

CHAPTER 2

UNIFORM TRUST RECEIPTS ACT

Section 65-201. Definition of terms.

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Election among filing statutes.

Rules of law to apply. 65-217.

65-218. Interpretation of act. 65-219. Act, how cited.

- 65-201. Definition of terms. 1. Definitions. In this act, unless the context or subject matter otherwise requires, the following words or phrases shall have the meaning hereinafter set forth.
- 2. Buyer. "Buyer in the ordinary course of trade" means a person to whom goods are sold and delivered for new value and who acts in good faith and without actual knowledge of any limitation on the trustee's liberty of sale, including one who takes by conditional sale or under a pre-existing mercantile contract with the trustee to buy the goods delivered, or like goods, for cash or on credit. "Buyer in the ordinary course of trade" does not include a pledgee, a mortgagee, a lienor, or a transferee in bulk.
 - 3. Documents. "Document" means any document of title to goods.
- 4. Entruster. "Entruster" means the person who has, or directly or by agent takes, a security interest in goods, documents or instruments under a trust receipt transaction, and any successor in interest of such person. A person in the business of selling goods or instruments for profit, who at the outset of the transaction has, as against the buyer, general property in such goods or instruments, and who sells the same to the buyer on credit, retaining title or other security interest under a purchase money mortgage or conditional sales contract or otherwise, is excluded.
- 5. Goods. "Goods" means any chattels personal other than money, things in action, or things so affixed to land as to become a part thereof.
 - 6. Instrument. "Instrument" means
- any negotiable instrument as defined in the Uniform Negotiable Instruments Law and amendments thereto, or
- any certificate of stock, or bond or debenture for the payment of money issued by a public or private corporation as a part of a series, or

- (c) any interim, deposit, or participation certificate or receipt, or other credit or investment instrument of a sort marketed in the ordinary course of business or finance, of which the trustee, after the trust receipt transaction, appears by virtue of possession and the face of the instrument to be the owner. "Instrument" does not include any document of title to goods.
- 7. Lien creditor. "Lien creditor" means any creditor who has acquired a specific lien on the goods, documents or instruments by attachment, levy, or by any other similar operation of law or judicial process, including a distraining landlord.
- 8. New value. "New value" includes new advances or loans made, or new obligations incurred, or the release or surrender of a valid and existing security interest, or the release of a claim to proceeds under section 65-210; but "new value" shall not be construed to include extensions or renewals of existing obligations of the trustee, nor obligations substituted for such existing obligations.
- 9. Person. "Person" means, as the case may be, an individual, trustee, receiver or other fiduciary, partnership, corporation, business trust, or other association, and two or more persons having a joint or common interest.
- 10. Possession. "Possession" as used in this act with reference to possession taken or retained by the entruster, means actual possession of goods, documents or instruments, or, in the case of goods, such constructive possession as, by means of tags or signs or other outward marks placed and remaining in conspicuous places, may reasonably be expected in fact to indicate to the third party in question that the entruster has control over or interest in the goods.
- 11. Purchase. "Purchase" means taking by sale, conditional sale, lease, mortgage, or pledge, legal or equitable.
- 12. Purchaser. "Purchaser" means any person taking by purchase. A pledgee, mortgagee or other claimant of a security interest created by contract is, in so far as concerns his specific security, a purchaser and not a creditor.
- 13. Security interest. "Security interest" means a property interest in goods, documents or instruments, limited in extent to securing performance of some obligation of the trustee or of some third person to the entruster, and includes the interest of a pledgee, and title, whether or not expressed to be absolute, whenever such title is in substance taken or retained for security only.
- 14. Transferee in bulk. "Transferee in bulk" means a mortgagee or a pledgee or a buyer of the trustee's business substantially as a whole.
- 15. Trustee. "Trustee" means the person having or taking possession of goods, documents or instruments under a trust receipt transaction, and any successor in interest of such person. The use of the word "trustee" herein shall not be interpreted or construed to imply the existence of a trust or any right or duty of a trustee in the sense of equity jurisprudence other than as provided by this act.
- 16. Value. "Value" means any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, and whether against the transferor or against another person, con-

stitutes value where goods, documents or instruments are taken either in satisfaction thereof or as security therefor.

History: En. Sec. 1, Ch. 147, L. 1945.

NOTE.—Uniform State Law. Sections 65-201 through 65-219 constitute the "Uniform Trust Receipts Act" approved by the National Conference of Commissioners on Uniform State Laws in 1933 and adopted in the states of Alabama, Arizona, California, Delaware, Florida, Idaho, Indiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin, and also Alaska, Hawaii, and Puerto Rico.

Operation and Effect

An insurance company was liable for the damage to an automobile in possession of an insured dealer who was a trustee under a trust receipt transaction, where the policy provided for the payment of all sums the dealer became obligated to pay because of injury to property customarily left in garages, but excluded property owned or loaned or rented to the insured. Keating v. Universal Underwriters Ins. Co., 133 M 89, 320 P 2d 351, 354.

Collateral References

Chattel Mortgages © 9. 14 C.J.S. Chattel Mortgages § 9.

Liability of one financing importation of goods, for reimbursement of third persons who pay charges or duties. 27 ALR 1526.

Title and rights incident to trust receipts generally. 168 ALR 366.

Law Review

Montana Law and the Uniform Commercial Code, 21 Mont. L. Rev. 1, 92, 104 (Fall 1959).

- 65-202. What are trust receipt transactions. 1. A trust receipt transaction within the meaning of this act is any transaction to which an entruster and a trustee are parties, for one of the purposes set forth in subdivision 3, whereby
- (a) the entruster or any third person delivers to the trustee goods, documents or instruments in which the entruster (i) prior to the transaction has, or for new value (ii) by the transaction acquires or (iii) as a result thereof is to acquire promptly, a security interest; or
- (b) the entruster gives new value in reliance upon the transfer by the trustee to such entruster of a security interest in instruments or documents which are actually exhibited to such entruster, or to his agent in that behalf, at a place of business of either entruster or agent, but possession of which is retained by the trustee; provided that the delivery under paragraph (a) or the giving of new value under paragraph (b) either
- (i) be against the signing and delivery by the trustee of a writing designating the goods, documents or instruments concerned, and reciting that a security interest therein remains in or will remain in, or has passed to or will pass to, the entruster, or
- (ii) be pursuant to a prior or concurrent written and signed agreement of the trustee to give such a writing.

The security interest of the entruster may be derived from the trustee or from any other person, and by pledge or by transfer of title or otherwise.

If the trustee's rights in the goods, documents or instruments are subject to a prior trust receipt transaction, or to a prior equitable pledge, section 65-209 and section 65-203, respectively, determine the priorities.

2. A writing such as is described in subdivision 1, paragraph (i), signed by the trustee, and given in or pursuant to such a transaction, is designated in this act as a "trust receipt." No further formality of execution or authentication shall be necessary to the validity of a trust receipt.

- 3. A transaction shall not be deemed a trust receipt transaction unless the possession of the trustee thereunder is for a purpose substantially equivalent to any one of the following:
- (a) in the case of goods, documents or instruments, for the purpose of selling or exchanging them or of procuring their sale or exchange; or
- (b) in the case of goods or documents, for the purpose of manufacturing or processing the goods delivered or covered by the documents, with the purpose of ultimate sale, or for the purpose of loading, unloading, storing, shipping, trans-shipping or otherwise dealing with them in a manner preliminary to or necessary to their sale; or
- (c) in the case of instruments, for the purpose of delivering them to a principal, under whom the trustee is holding them, or for consummation of some transaction involving delivery to a depositary or registrar, or for their presentation, collection, or renewal.

History: En. Sec. 2, Ch. 147, L. 1945,

Liability of Trustee

A trustee under a trust receipt transaction assumes the full risk of loss or destruction of property left in his possession when the loss is due to his negligence. Keating v. Universal Underwriters Ins. Co., 133 M 89, 320 P 2d 351, 357.

Object of Transactions

A cardinal object of trust receipt transactions is to enable the borrower to sell the goods in order to pay the lender, but the transactions never have for their object the vesting of ownership in the dealer. Keating v. Universal Underwriters Ins. Co., 133 M 89, 320 P 2d 351, 355.

Type of Transactions

Where the financier advances funds for the purchase of the chattel, purchases it and receives title to it from the manufacturer, and delivers possession to the dealer, who gives his trust receipt to the financier, it is a tripartite or true orthodox trust receipt transaction, and where the dealer has title and gives his receipt to the financier it is a bipartite trust receipt transaction. Keating v. Universal Underwriters Ins. Co., 133 M 89, 320 P 2d 351, 354

Validity of Transactions

One of the purposes of the act is to make bipartite trust receipt transactions as valid as tripartite trust transactions. Keating v. Universal Underwriters Ins. Co., 133 M 89, 320 P 2d 351, 357.

Collateral References

Chattel Mortgages ⊕9. 14 C.J.S. Chattel Mortgages § 9.

- 65-203. When pledge or agreement is valid against creditors. 1. An attempted pledge or agreement to pledge not accompanied by delivery of possession, which does not fulfill the requirements of a trust receipt transaction, shall be valid as against creditors of the pledger only as follows:
- (a) to the extent that new value is given by the pledgee in reliance thereon, such pledge or agreement to pledge shall be valid as against all creditors with or without notice, for ten (10) days from the time the new value is given;
- (b) to the extent that the value given by the pledgee is not new value, and in the case of new value after the lapse of ten days from the giving thereof, the pledge shall have validity as against lien creditors without notice, who become such as prescribed in section 65-208, only as of the time the pledgee takes possession, and without relation back.
- 2. Purchasers (including entrusters) for value and without notice of the pledgee's interest shall take free of any such pledge or agreement to pledge unless, prior to the purchase, it has been perfected by possession taken.

3. Where, under circumstances not constituting a trust receipt transaction, a person, for a temporary and limited purpose, delivers goods, documents, or instruments, in which he holds a pledgee's or other security interest, to the person holding the beneficial interest therein, the transaction has like effect with a purported pledge for new value under this section.

History: En. Sec. 3, Ch. 147, L. 1945.

- 65-204. Contracts for trust receipts. 1. A contract to give a trust receipt, if in writing and signed by the trustee, shall, with reference to goods, documents or instruments thereafter delivered by the entruster to the trustee in reliance on such contract, be equivalent in all respects to a trust receipt.
- 2. Such a contract shall as to such goods, documents, or instruments be specifically enforceable against the trustee; but this subdivision shall not enlarge the scope of the entruster's rights against creditors of the trustee as limited by this act.

History: En. Sec. 4, Ch. 147, L. 1945.

65-205. Validity between the parties. Between the entruster and the trustee the terms of the trust receipt shall, save as otherwise provided by this act, be valid and enforceable. But no provision for forfeiture of the trustee's interest shall be valid except as provided in subdivision 5 of section 65-206.

History: En. Sec. 5, Ch. 147, L. 1945.

- 65-206. Repossession, and entruster's rights on default. 1. The entruster shall be entitled as against the trustee to possession of the goods, documents or instruments on default, and as may be otherwise specified in the trust receipt.
- 2. An entruster entitled to possession under the terms of the trust receipt or of subdivision 1 may take such possession without legal process, whenever that is possible without breach of the peace.
- 3. (a) After possession taken, the entruster shall, subject to subdivision 3 (b) and subdivision 5 of this section, hold such goods, documents or instruments with the rights and duties of a pledgee.
- (b) An entruster in possession may, on or after default, give notice to the trustee of intention to sell, and may, not less than five days after the serving or sending of such notice, sell the goods, documents or instruments for the trustee's account, at public or private sale, and may at a public sale himself become a purchaser. The proceeds of any such sale, whether public or private, shall be applied (i) to the payment of the expenses thereof, (ii) to the payment of the expenses of retaking, keeping and storing the goods, documents, or instruments, (iii) to the satisfaction of the trustee's indebtedness. The trustee shall receive any surplus and shall be liable to the entruster for any deficiency. Notice of sale shall be deemed sufficiently given if in writing, and either (i) personally served on the trustee, or (ii) sent by postpaid ordinary mail to the trustee's last known business address.
- (c) A purchaser in good faith and for value from an entruster in possession takes free of the trustee's interest, even in a case in which the entruster is liable to the trustee for conversion.

- 4. Surrender of the trustee's interest to the entruster shall be valid, on any terms upon which the trustee and the entruster may, after default, agree.
- 5. As to articles manufactured by style or model, the terms of the trust receipt may provide for forfeiture of the trustee's interest, at the election of the entruster, in the event of the trustee's default, against cancellation of the trustee's then remaining indebtedness; provided that in the case of the original maturity of such an indebtedness there must be canceled not less than 80 per cent of the purchase price to the trustee, or of the original indebtedness, whichever is greater; or, in the case of a first renewal, not less than 70 per cent, or, in the case of a second or further renewal, not less than 60 per cent.

History: En. Sec. 6, Ch. 147, L. 1945.

- 65-207. General effect of entruster's filing or taking possession. 1. (a) If the entruster within the period of 30 days specified in subdivision 1 of section 65-208 files as in this act provided, such filing shall be effective to preserve his security interest in documents or goods against all persons, save as otherwise provided by sections 65-208, 65-209, 65-210, 65-211, 65-214 and 65-215.
- (b) Filing after the lapse of the said period shall be valid; but in such event, save as provided in subdivision 2 (b) of section 65-209, the entruster's security interest shall be deemed to be created by the trustee as of the time of such filing, without relation back, as against all persons not having notice of such interest.
- 2. The taking of possession by the entruster shall, so long as such possession is retained, have the effect of filing, in the case of goods or documents; and of notice of the entruster's security interest to all persons, in the case of instruments.

History: En. Sec. 7, Ch. 147, L. 1945.

65-208. Validity against creditors. 1. The entruster's security interest in goods, documents or instruments under the written terms of a trust receipt transaction, shall without any filing be valid as against all creditors of the trustee, with or without notice, for thirty (30) days after delivery of the goods, documents or instruments to the trustee, and thereafter except as in this act otherwise provided.

But where the trustee at the time of the trust receipt transaction has and retains instruments or documents, the thirty (30) days shall be reckoned from the time such instruments or documents are actually shown to the entruster, or from the time that the entruster gives new value under the transaction, whichever is prior.

- 2. Save as provided in subdivision 1, the entruster's security interest shall be void as against lien creditors who become such after such thirty (30) day period and without notice of such interest and before filing.
- 3. (a) Where a creditor secures the issuance of process which within a reasonable time after such issuance results in attachment of or levy on the goods, he is deemed to have become a lien creditor as of the date of the issuance of the process.

(b) Unless prior to the acquisition of notice by all creditors filing has occurred or possession has been taken by the entruster, (i) an assignee for the benefit of creditors, from the time of assignment, or (ii) a receiver in equity from the time of his appointment, or (iii) a trustee in bankruptcy or judicial insolvency proceedings from the time of filing of the petition in bankruptcy or judicial insolvency by or against the trustee, shall on behalf of all creditors, stand in the position of a lien creditor without notice, without reference to whether he personally has or has not, in fact, notice of the entruster's interest.

History: En. Sec. 8, Ch. 147, L. 1945.

- 65-209. Limitations on entruster's protection against purchasers. 1.

 (a) Nothing in this act shall limit the rights of purchasers in good faith and for value from the trustee of negotiable instruments or negotiable documents, and purchasers taking from the trustee for value, in good faith, and by transfer in the customary manner instruments in such form as are by common practice purchased and sold as if negotiable, shall hold such instruments free of the entruster's interest; and filing under this act shall not be deemed to constitute notice of the entruster's interest to purchasers in good faith and for value of such document or instruments, other than transferees in bulk.
- (b) The entrusting (directly, by agent, or through the intervention of a third person) of goods, documents or instruments by an entruster to a trustee, under a trust receipt transaction or a transaction falling within section 65-203, shall be equivalent to the like entrusting of any documents or instruments which the trustee may procure in substitution, or which represent the same goods or instruments or the proceeds thereof, and which the trustee negotiates to a purchaser in good faith and for value.
- 2. Where a buyer from the trustee is not protected under subdivision 1 hereof, the following rules shall govern:
 - (a) Sales by trustee in the ordinary course of trade.
- (i) Where the trustee, under the trust receipt transaction, has liberty of sale and sells to a buyer in the ordinary course of trade, whether before or after the expiration of the thirty (30) day period specified in subdivision 1 of section 65-208, and whether or not filing has taken place, such buyer takes free of the entruster's security interest in the goods so sold, and no filing shall constitute notice of the entruster's security interest to such a buyer.
- (ii) No limitation placed by the entruster on the liberty of sale granted to the trustee shall affect a buyer in the ordinary course of trade, unless the limitation is actually known to the latter.
 - (b) Purchasers other than buyers in the ordinary course of trade.

In the absence of filing the entruster's security interest in goods shall be valid, as against purchasers, save as provided in this section; but any purchaser, not a buyer in the ordinary course of trade, who, in good faith and without notice of the entruster's security interest and before filing, either (i) gives new value before the expiration of the 30 day period specified in subdivision 1 of section 65-208, or (ii) gives value after said period, and who in either event before filing also obtains delivery of goods from a

trustee shall hold the subject matter of his purchase free of the entruster's security interest; but a transferee in bulk can take only under (ii) of this subdivision 2 (b).

(c) Liberty of sale.

If the entruster consents to the placing of goods subject to a trust receipt transaction in the trustee's stock in trade or in his sales or exhibition rooms, or allows such goods to be so placed or kept, such consent or allowance shall have like effect as granting the trustee liberty of sale.

3. As to all cases covered by this section the purchase of goods, documents or instruments on credit shall constitute a purchase for new value, but the entruster shall be entitled to any debt owing to the trustee and any security therefor, by reason of such purchase; except that the entruster's right shall be subject to any setoff or defense valid against the trustee and accruing before the purchaser has actual notice of the entruster's interest.

History: En. Sec. 9, Ch. 147, L. 1945.

- 65-210. Entruster's right to proceeds. Where, under the terms of the trust receipt transaction, the trustee has no liberty of sale or other disposition, or, having liberty of sale or other disposition, is to account to the entruster for the proceeds of any disposition of the goods, documents or instruments, the entruster shall be entitled, to the extent to which and as against all classes of persons as to whom his security interest was valid at the time of disposition by the trustee, as follows:
 - (a) to the debts described in section 65-209(3); and also
- (b) to any proceeds or the value of any proceeds (whether such proceeds are identifiable or not) of the goods, documents or instruments, if said proceeds were received by the trustee within ten days prior to either application for appointment of a receiver of the trustee, or the filing of a petition in bankruptcy or judicial insolvency proceedings by or against the trustee, or demand made by the entruster for prompt accounting; and to a priority to the amount of such proceeds or value; and also
- (c) to any other proceeds of the goods, documents or instruments which are identifiable, unless the provision for accounting has been waived by the entruster by words or conduct; and knowledge by the entruster of the existence of proceeds, without demand for accounting made within ten days from such knowledge, shall be deemed such a waiver.

History: En. Sec. 10, Ch. 147, L. 1945.

65-211. Specific liens. Specific liens arising out of contractual acts of the trustee with reference to the processing, warehousing, shipping or otherwise dealing with specific goods in the usual course of the trustee's business preparatory to their sale shall attach against the interest of the entruster in said goods as well as against the interest of the trustee, whether or not filing has occurred under this act; but this section shall not obligate the entruster personally for any debt secured by such lien; nor shall it be construed to include the lien of a landlord.

History: En. Sec. 11, Ch. 147, L. 1945.

65-212. Entrusters not liable. An entruster holding a security interest shall not, merely by virtue of such interest or of his having given the

trustee liberty of sale or other disposition, be responsible as principal or as vendor under any sale or contract to sell made by the trustee.

History: En. Sec. 12, Ch. 147, L. 1945.

- 65-213. Filing and refiling. 1. Any entruster undertaking or contemplating trust receipt transactions with reference to documents or goods is entitled to file with the registrar of motor vehicles in case the goods consist of automobiles, trucks, trailers and/or semitrailers, or with the secretary of state and a copy with the clerk and recorder of the county wherein the goods and/or instruments are located in the case of any other trust receipt transaction a statement, signed by the entruster and the trustee, containing:
- (a) a designation of the entruster and the trustee, and of the chief place of business of each within this state, if any; and if the entruster has no place of business within the state, a designation of his chief place of business outside the state; and
- (b) a statement that the entruster is engaged, or expects to be engaged, in financing under trust receipt transactions the acquisition of goods by the trustee; and
- (c) a description of the kind or kinds of goods covered or to be covered by such financing.
- 2. The following form of statement (or any other form of statement containing substantially the same information) shall suffice for the purposes of this act.

STATEMENT OF TRUST RECEIPT FINANCING

"The entruster, whose chief place of business within
this state is at (or who has no place of business
within this state and whose chief place of business outside this state is at
) is or expects to be engaged in financing under trust
receipt transactions the acquisition by the trustee, whose
chief place of business within this state is at of goods
of the following description: (coffee, silk, automobiles, or the like.)
(Signed)Entruster

(Signed).....Entruster (Signed).....Trustee."

- 3. It shall be the duty of the filing officer to mark each statement filed with a consecutive file number, and with the date and hour of filing, and to keep such statement in a separate file; and to note and index the filing in a suitable index, indexed according to the name of the trustee and containing a notation of the trustee's chief place of business as given in the statement. The fee for such filing shall be three dollars (\$3.00).
- 4. Presentation for filing of the statement described in subdivision 1, and payment of the filing fee, shall constitute filing under this act, in favor of the entruster, as to any documents or goods falling within the description in the statement which are within one year from the date of such filing, or have been, within 30 days previous to such filing, the subject matter of a trust receipt transaction between the entruster and trustee.
- 5. At any time before expiration of the validity of the filing, as specified in subdivision 4, a like statement, or an affidavit by the entruster alone,

setting out the information required by subdivision 1, may be filed in like manner as the original filing. Any filing of such further statement or affidavit shall be valid in like manner and for like period as an original filing, and shall also continue the rank of the entruster's existing security interest as against all junior interest. It shall be the duty of the filing officer to mark, file and index the further statement or affidavit in like manner as the original.

History: En. Sec. 13, Ch. 147, L. 1945; amd. Sec. 13, Ch. 117, L. 1961.

Operation and Effect

Even though none of the documents in a trust receipt transaction between an automobile dealer and a finance company

were filed or recorded, the fact made no difference with respect to the liability of an insurer for injury to an automobile in the possession of the insured dealer. Keating v. Universal Underwriters Ins. Co., 133 M 89, 320 P 2d 351, 357.

65-214. Entruster's security interest. As against purchasers and creditors, the entruster's security interest may extend to any obligation for which the goods, documents or instruments were security before the trust receipt transaction, and to any new value given or agreed to be given as a part of such transaction; but not, otherwise, to secure past indebtedness of the trustee; nor shall the obligation secured under any trust receipt transaction extend to obligations of the trustee to be subsequently created.

History: En. Sec. 14, Ch. 147, L. 1945.

65-215. Application of act. This act shall not apply to single transactions of legal or equitable pledge, not constituting a course of business, whether such transactions be unaccompanied by delivery of possession, or involve constructive delivery, or delivery and redelivery, actual or constructive, so far as such transactions involve only an entruster who is an individual natural person, and a trustee entrusted as a fiduciary with handling investments or finances of the entruster; nor shall it apply to transactions of bailment or consignment in which the title of the bailor or consignor is not retained to secure an indebtedness to him of the bailee or consignee.

History: En. Sec. 15, Ch. 147, L. 1945.

65-216. Election among filing statutes. As to any transaction falling within the provisions both of this act and of any other act requiring filing or recording, the entruster shall not be required to comply with both, but by complying with the provisions of either at his election may have the protection given by the act complied with; except that buyers in the ordinary course of trade as described in subdivision 2 of section 65-209, and lienors as described in section 65-211, shall be protected as therein provided, although the compliance of the entruster be with the filing or recording requirements of another act.

History: En. Sec. 16, Ch. 147, L. 1945.

65-217. Rules of law to apply. In any case not provided for in this act the rules of law and equity, including the law merchant, shall continue to apply to trust receipt transactions and purported pledge transactions not accompanied by delivery of possession.

History: En. Sec. 17, Ch. 147, L. 1945.

65-218. Interpretation of act. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it.

History: En. Sec. 18, Ch. 147, L. 1945.

65-219. Act, how cited. This act may be cited as the Uniform Trust Receipts Act.

History: En. Sec. 19, Ch. 147, L. 1945.

TITLE 66

PROFESSIONS AND OCCUPATIONS

Abstracters: See Title abstracters, 66-2101 to 66-2120, below. Accountants: See Public accountants, 66-1801 to 66-1812, below.

- Chapter 1.
- Architecture—regulation of practice, 66-101 to 66-115. Auctioneers and auction sales, 66-201 to 66-230. Attorneys (See Secs. 93-2101 to 93-2121). 3. 4.
 - Barbers and barber shops, 66-401 to 66-412. Chiropractic—regulation of practice, 66-501 to 66-517. 5.
 - Chiropody—regulation of practice, 66-601 to 66-611. 6. Commission merchants-regulation, 66-701 to 66-703.
 - 8.
 - Cosmetology (beauty shops) regulation, 66-801 to 66-818. Dentistry—regulation of practice, 66-901 to 66-925. Embalmers and funeral directors (See chapter 7 of Title 82). 9.
 - 10. Medicine—regulation of practice, 66-1001 to 66-1009.
 - 11.
 - Motor club service companies—regulation, 66-1101 to 66-1115. Nursing—regulation of practice (66-1201 to 66-1220 Repealed), 66-1221 12. to 66-1245.
 - Optometry—regulation, 66-1301 to 66-1317. 13.
 - Osteopathy—regulation of practice, 66-1401 to 66-1413. 14.
 - 15. Pharmacy—regulation of sale of drugs and medicines, 66-1501 to 66-1527.
 - 16. Pawnbrokers and junk dealers—regulations, 66-1601 to 66-1607.
 - 17. Photography-regulation-Unconstitutional.
 - 18. Public accountants—regulation, 66-1801 to 66-1812.
 - Real estate brokers-regulation-real estate commissioner, 66-1901 to 19. 66-1923.
 - 20. Stockbrokers and investment companies (Blue Sky Law), Repealed-Section 28, Chapter 251, Laws of 1961.
 - Title abstracters-regulation, 66-2101 to 66-2120. 21.
 - 22.
 - Veterinary medicine—regulation of practice, 66-2201 to 66-2212. Engineers and land surveyors (66-2301 to 66-2323 Repealed), 66-2324 to 23. 66-2347.
 - 24.
 - Plumbers, 66-2401 to 66-2426. Physical Therapists Practice Act, 66-2501 to 66-2517. 25.
 - 26. Water Well Contractor's License Act, 66-2601 to 66-2614.

CHAPTER 1

ARCHITECTURE—REGULATION OF PRACTICE

- Appointment of board of architectural examiners. Section 66-101.
- 66-102. Organization of board—powers, meetings and records.
 - Definitions—examinations for certificates to practice—subjects embraced in—granting of certificates—registration without examina-66-103. tion under certain circumstances.
 - 66-104. Certificates to be recorded.
 - 66-105. Seal of architect.
 - 66-106. Penalty for illegal practice or misuse of title.
 - Registration limited to individuals-employees of architects entitled 66-107. to practice under supervision-exceptions-exemptions. 66-108.
 - Fees payable by applicants for examination-disposition of fees. Compensation of members of board-disposition and use of funds-66-109. annual report.
 - Annual fee of licensed architects. 66-110.
 - 66-111. Architects removing from state to be granted demit.
 - 66-112. Revocation of license.

- 66-113. Architects on public buildings must hold certificate from board of architectural examiners.
- 66-114. Scale of compensation for architects on public buildings. 66-115. Payment for extra services—time schedule for payments.
- 66-101. (3229) Appointment of board of architectural examiners. Within thirty days after the passage of this act, the governor, with the consent and advice of the senate, shall appoint three skilled and capable architects, who shall have been residents of the state of Montana for not less than three years prior to their appointment, not more than two of whom shall be residents of the same county, and who shall have been in continuous practice of the profession for three years, who shall constitute the board of architectural examiners for the purpose of this act.

The architects so appointed shall hold their respective offices for a term of four years, and all vacancies shall be filled in like manner as the appointments are made. Appointments made when the senate is not in session shall take effect immediately, and may be confirmed at the next ensuing session.

History: En. Sec. 1, Ch. 158, L. 1917; Collateral References re-en. Sec. 3229, R. C. M. 1921. 3 Am. Jur. 998, Architects, §§ 3 et seq.

66-102. (3230) Organization of board—powers, meetings and records. The board of architectural examiners must, during the first week in April of each year, elect from among their number a president, secretary, and treasurer, and must have a seal.

The president and secretary shall have power to administer oaths in examination of applications for certificates, and to witnesses called before the board for the transaction of business under the provisions of this act.

The members of the board shall meet during the first week of April of each year, and at such times, and at the same and other places as the board may determine.

The board must keep a record of all proceedings thereof, and also a register of all applicants for a certificate, with the name and age of all applicants and the number of years spent in the study of architecture, and whether or not the applicant was granted a certificate or rejected; such register is prima-facie evidence of all matters therein kept.

History: En. Sec. 2, Ch. 158, L. 1917; re-en. Sec. 3230, R. C. M. 1921.

- 66-103. (3231) Definitions—examinations for certificates to practice—subjects embraced in—granting of certificates—registration without examination under certain circumstances. (a) Except as otherwise provided in this act, no person shall practice architecture in the state of Montana or use the title "architect" or "registered architect," or any words, letters, figures, or other device indicating or intending to imply that he or she is an architect, without having qualified as required by this act.
- (b) The practice of architecture within the meaning and intent of this act consists of rendering or offering to render services by consultations, preliminary studies, drawings, specifications, or any other service in connection with the design of a building or addition or alteration thereto, whether one or all of these services are performed either in person or as the directing head of an organization.

- (c) An architect within the meaning of this act is an individual technically and legally qualified to practice architecture and who is authorized under this act to practice architecture.
- (d) A building, for the purposes of this act, is a structure consisting of foundation, floors, walls, columns, girders, and roof, or a combination of any number of these parts, including related mechanical and electrical equipment, with or without other parts or appurtenances.
- Every person hereafter wishing to practice architecture in this state shall apply to said board for a certificate so to do. Every person so applying shall submit to an examination in the following branches, to wit: Arithmetic and elementary mathematics, knowledge of building materials and construction, structural, mechanical and electrical engineering phases of construction, architectural drawing, technical education and experience, and such other branches as the board may deem advisable. Said board shall cause such examination to be both scientific and practical, but of sufficient severity to test the candidate's fitness to practice architecture in this state. After examination said board shall, if the candidate has been found qualified, grant a certificate to such candidate to practice architecture within the state of Montana, which said certificate can only be granted on the consent of not less than two members of the board, and attested by the secretary, and have the seal of said board attached thereto; provided, that the president of the board may, in the time of intervening between the sessions of the board, grant a certificate to any person desiring to practice architecture within the state of Montana, after satisfying himself of the qualifications of the applicant, which said certificate shall be good until the next regular meeting of the board; provided, however, the board may make arrangements with similar boards in the several states in so far as practicable, whereby due credit for state and territorial licenses will be allowed in the state of Montana to such licensees of said boards as desire to secure license to practice architecture in this state. and whereby licensees of the board of architectural examiners in this state will secure due credit for license issued by said board whenever such licensees desire to secure license to practice in any other state or territory; but no arrangement shall be made under the provisions of this section which will be liable to lower the standard of practice of architecture in the state of Montana. The board may, if deemed necessary, require an examination of applicants for license from other states after careful consideration of credentials from such states. The board shall by regulation establish methods and procedures for investigation of applicants for license by reciprocity.
- (f) Any properly qualified person shall be granted registration without examination who submits an affidavit establishing to the satisfaction of the board of architectural examiners that he or she was a resident of the state of Montana for one (1) year immediately preceding the passage and approval of this act, that he or she was regularly engaged in the practice of architecture in the state of Montana for five (5) years immediately preceding July 1, 1957; provided that registration shall not be granted under this subsection unless the application therefor is filed with the board

of architectural examiners within one (1) year after passage and approval of this act.

History: En. Sec. 3, Ch. 158, L. 1917; re-en. Sec. 3231, R. C. M. 1921; amd. Sec. 1, Ch. 149, L. 1957.

Failure of architect to procure license as affecting validity or enforceability of contracts. 30 ALR 834; 42 ALR 1226 and 118 ALR 646.

Collateral References

Licenses 22. 53 C.J.S. Licenses § 39.

66-104. (3232) Certificates to be recorded. Every person obtaining a certificate from said board must, within thirty days from the date thereof, have the same recorded in the office of the county clerk and recorder of the county wherein he resides. If he or she maintain offices for the practice of architecture in other counties, he or she must have his or her certificate recorded in such counties in like manner. The county clerk shall receive for recording such certificate the usual fee paid by the applicant.

History: En. Sec. 4, Ch. 158, L. 1917; re-en. Sec. 3232, R. C. M. 1921.

Collateral References

66-105. (3233) Seal of architect. Every licensed architect shall have a seal, the impression of which must contain the name of the architect, his or her place of business, and the words "Licensed Architect, State of Montana," with which he or she shall stamp all drawings and specifications issued from his or her office for use in this state.

History: En. Sec. 5, Ch. 158, L. 1917; re-en. Sec. 3233, R. C. M. 1921.

tectural plans, drawings, or designs, so as to result in loss of common-law copyright. 77 ALR 2d 1048.

Collateral References

What constitutes publication of archi-

66-106. (3234) Penalty for illegal practice or misuse of title. Any person who shall use the title "architect" or "registered architect" or any other words, letters, figures, or other device indicating or intending to imply that the person using the same is an architect, or who shall engage in the practice of architecture within the meaning of this act, or shall accept compensation for rendering architectural service, without first having complied with the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than two hundred dollars (\$200.00) nor more than five hundred dollars (\$500.00), or by imprisonment in the county jail for not less than thirty (30) days nor more than six (6) months, or by both such fine and imprisonment. Any person convicted a second time for any violation of this act shall be punished by both such fine and imprisonment. The district court shall have jurisdiction of all prosecutions brought hereunder.

History: En. Sec. 6, Ch. 158, L. 1917; re-en. Sec. 3234, R. C. M. 1921; amd. Sec. 4, Ch. 149, L. 1957.

Collateral References Licenses \$\infty 40, 41. 53 C.J.S. Licenses §§ 63, 66.

66-107. (3235) Registration limited to individuals — employees of architects entitled to practice under supervision—exceptions—exemptions.

(a) No firm, company, partnership, association, corporation or other

similar organization shall be registered as an architect. Only individuals shall be registered as architects but a number of architects constituting a firm may use the collective title "architects" or "registered architects."

- Nothing contained in this act shall prevent draftsmen, students, clerks of work, superintendents, and other employees of those lawfully practicing as architects under the provisions of this act from acting under the instruction, control, or supervision of their employers, or to prevent the employment of superintendents of the construction, enlargement, or structural alteration of buildings or any appurtenance thereto. Nor shall anything contained in this act be construed to apply to alterations to any building which do not involve changes affecting the structural safety thereof or the public health; nor to prevent the preparation of details and shop drawings by persons, other than architects, for use in connection with the execution of their work; nor to prevent the preparation of drawings or details for fixtures, cabinet work, furniture, or other interior appliances or equipment, or for any work necessary to provide for their installation unless the same involves public health or safety. None of the acts enumerated in this paragraph shall be interpreted or construed as the practice of architecture.
- (c) Nothing in this act shall be construed to affect or prevent the following, provided that no words, letters, figures, or other device shall be used in such manner as to tend to convey the impression that the person rendering such service is an architect duly registered under this act:
- 1. Consultants, officers, and employees of the United States while engaged solely in the practice of architecture for said government.
- 2. Professional engineers from performing architectural services which are purely incidental to their engineering practice.
- 3. Any person from planning, designing, altering, constructing, repairing, or supervising construction of residential or farm buildings.
- 4. The planning, designs, alteration, consultation, repair or supervision of a building by its owner.

History: En. Sec. 7, Ch. 158, L. 1917; re-en. Sec. 3235, R. C. M. 1921; amd. Sec. 2, Ch. 149, L. 1957.

Collateral References Licenses 20. 53 C.J.S. Licenses § 33.

Practice of architecture by corporation. 56 ALR 2d 726.

66-108. (3236) Fees payable by applicants for examination—disposition of fees. Applicants for examination shall pay in advance to the secretary of said board a fee of fifteen dollars, which fee shall defray the entire expense of such candidate, before the aforesaid board of architectural examiners. Any applicant failing to pass the said examination shall be entitled to a second examination within one year without fee.

The money received from said applicant shall be turned over to the state treasurer of the state of Montana, and shall be deposited by him in the architectural board fund as herein provided.

History: En. Sec. 8, Ch. 158, L. 1917; re-en. Sec. 3236, R. C. M. 1921.

66-109. (3237) Compensation of members of board—disposition and use of funds—annual report. Each member of the examining board is hereby allowed the sum of five dollars per day and mileage at the rate of ten cents per mile while in the discharge of his actual duties, to be paid out of any funds in the hands of the state treasurer in the name of the architectural board fund. And there is hereby established a fund known as the "architectural board fund."

And all fees and moneys received for licenses from practicing architects shall be deposited with the state treasurer to the credit of the architectural board fund, to meet the expenses incurred in carrying out the provisions of this act; provided the expenses of said board of examiners shall not exceed the fees collected.

The state treasurer is hereby directed and required to set such sums paid from licenses and fees apart for the credit of such fund, subject to the orders and disbursement hereinafter provided for.

The money in such fund can only be paid out on a warrant signed by the secretary of said board, countersigned by the president, and the members of the said board shall report annually to the governor on the first Monday of January of each year, which report must show all the transactions of the board, giving the number and names of all applicants, and the number and names of those rejected, and those to whom certificates have been issued, the expenses, the fees and mileage paid, the amount of money received, and the amount of money remaining in said fund.

History: En. Sec. 9, Ch. 158, L. 1917; re-en. Sec. 3237, R. C. M. 1921.

Collateral References Licenses©=21. 53 C.J.S. Licenses § 37.

66-110. (3238) Annual fee of licensed architects. Every licensed architect in the state who desires to continue the practice of his profession shall annually, during the time he or she shall continue in such practice, pay to the treasurer of the state of Montana, during the month of July, a fee of ten dollars.

History: En. Sec. 10, Ch. 158, L. 1917; re-en. Sec. 3238, R. C. M. 1921.

Collateral References Licenses©28 et seq. 53 C.J.S. Licenses § 46.

Cross-References

County license, sec. 84-3207. Licensing by cities, sec. 11-918.

66-111. (3239) Architects removing from state to be granted demit. A licensed architect removing from the state may receive a demit from the board of architectural examiners, and if he desires to re-establish himself in the state, the board will issue a certificate to him without examination; provided, however, he shall pay the regular license fee.

History: En. Sec. 11, Ch. 158, L. 1917; re-en. Sec. 3239, R. C. M. 1921.

Collateral References
Licenses©=36.
53 C.J.S. Licenses § 42.

66-112. (3240) Revocation of license. The board of architectural examiners may revoke any certificate in the manner hereinafter provided if proof satisfactory to the board be presented in the following cases:

(a) In case it is shown that the certificate was obtained through fraud

or misrepresentation; (b) In case the holder of the certificate has been found guilty by said board or by a court of justice of any fraud or deceit in his professional practice or has been convicted of a felony by a court of justice; (c) In case the holder of the certificate has been found guilty by said board of gross incompetency or of recklessness in the planning or construction of buildings.

The proceedings for revocation of a certificate shall be commenced by filing written charges against the accused with the board of architectural examiners either by the board itself or by any complainant. A copy of the charges together with a notice of the time and place of hearing shall be served on the accused at least thirty calendar days in advance of such hearing. Where personal service cannot be made within the state of Montana, service may be made by publication in accordance with such rules as the board may adopt, following generally and in principle the provisions of sections 93-3013, 93-3014, and 93-3015. At the hearing, the accused shall have the right to be represented by counsel, introduce evidence, and examine and cross-examine witnesses. The secretary of the board is hereby empowered to administer oaths. The board shall make a written report of its findings and conclusions, which report, with a transcript of the entire record of the proceedings, shall be filed in the office of the secretary of state, and, if the board's findings and conclusions shall be adverse to the accused, his or her certificate shall stand revoked and annulled at the expiration of thirty days from the filing of such report, unless within said period of thirty days a writ of review shall be issued as hereinafter provided, in which event said certificate shall not stand suspended until the final determination of the courts upon such writ of review.

Any party aggrieved by the decision of the said board may seek a review thereof in the district court of the first judicial district of the state of Montana in the manner set forth in sections 93-9001 to 93-9011, and said court shall affirm, reverse, or modify the findings of said board in accordance with law.

The said board shall have power to require the attendance of persons and the production of books and papers and to require such persons to testify in any and all matters within its jurisdiction. The chairman and the secretary of the board shall have power to issue subpoenas, and upon the failure of any person to attend as a witness when duly subpoenaed or to produce the documents when duly directed by said board, the board shall have power to refer the said matter to the district court of the first judicial district of the state of Montana, which may order the attendance of such witness or the production of such books and papers or require the said witness to testify, as the case may be; and upon the failure of the witness to attend, to testify, or to produce such books or papers, as the case may be, such witness may be punished for contempt of court as for failure to obey a subpoena issued or to testify in a case pending before said court.

History: En. Sec. 12, Ch. 158, L. 1917; re-en. Sec. 3240, R. C. M. 1921; amd. Sec. 3, Ch. 149, L. 1957.

Compiler's Note

Sections 93-3013, 93-3014, and 93-3015 referred to in this section were repealed by Sec. 84, Ch. 13, Laws 1961.

Collateral References

Licenses 38. 53 C.J.S. Licenses § 44.

66-113. Architects on public buildings must hold certificate from board of architectural examiners. No contract for the employment of or the rendering of professional services by any architect relating to the planning or construction of public buildings or other public works or improvements shall hereafter be entered into by the state of Montana or any board, department or agency thereof, or any county, city or school district in the state unless such architect shall be the holder in good standing of a certificate by the board of architectural examiners of the state of Montana entitling him to practice architecture in this state.

History: En. Sec. 1, Ch. 190, L. 1953.

Collateral References Licenses©24. 53 C.J.S. Licenses § 41.

66-114. Scale of compensation for architects on public buildings. No payment for professional services of any architect or architects, relating to the planning or construction of public buildings of the state of Montana, or any agency thereof, or of any county, city, or school district in the state, shall hereafter be made at any greater rate of compensation for such professional services than hereinafter set forth; and no contract for professional services of any architect or architects, relating to the planning or construction of any such public buildings, works or improvements, shall hereafter be entered into by any board, department or agency of the state of Montana, or of any county, city or school district in the state which shall provide for payment of any greater rate of compensation for such professional services than the following percentages of actual cost of construction of such buildings, works or improvements, to wit:

"A" Rate—Specialized Types: Structures of individual design and detail requiring special skill and prolonged study such as banks, clinics, club buildings, hospitals, libraries, memorials, monuments, museums, and residences:

	Fee		Construction Cost
	8.00%	of first	\$ 50,000
Plus	7.75%	of next	50,000
Plus	7.50%	of next	100,000
Plus	7.00%	of next	300,000
Plus	6.00%	of next	500,000
Plus	 5.00%	of all additional	

"B" Rate—Conventional Types: Structures of conventional character such as apartments, administrative buildings, bus and railway depots, churches, gymnasiums, dormitories, fire stations, nurses' homes, office buildings, restaurants, schools, shopping centers, stores and shops and theaters:

	Fee	Construction Cost
	7.50% of first	\$ 50,000
Plus	7.25% of next	50,000
Plus	7.00% of next	100,000
Plus	6.50% of next	300,000
Plus	5.50% of next	500,000
Plus	4.50% of all additional	

"C" Rate—Utilitarian Types: Structures of simplest utilitarian character such as airport hangars, armories, field houses, garages, shop maintenance buildings, multiple housing projects, stadiums, warehouses:

	Fee		>	~	Construction Cost
	6.50%	of	first		\$ 50,000
Plus	6.25%	of	next		50,000
Plus	6.00%	of	next		100,000
Plus	5.50%	of	next		300,000
Plus	4.50%	of	next		500,000
Plus	3.50%	of	all additional		

All architectural plans and specifications for such public buildings of the state of Montana, or any agency thereof, or of any county, city, or school district of the state, shall bear the seal and signature of the architect responsible therefor.

History: En. Sec. 2, Ch. 190, L. 1953; amd. Sec. 1, Ch. 68, L. 1957; amd. Sec. 1, Ch. 167, L. 1961.

66-115. Payment for extra services—time schedule for payments. Said rate of compensation shall constitute full payment for all services and functions whatsoever of the contracting architect or architects and his and their employees and subcontractors including, but not limited to, consultation, preliminary studies, sketches, and estimates of costs, preparation of working drawings and working plans and specifications, preparation of advertisement of bids, bid forms, certificates of estimates, and inspection and supervision of construction; provided, however, that if the architect is caused extra drafting or other expense due to changes ordered by the owner, or due to the delinquency or insolvency of the owner or contractor, or as a result of damage by fire, he shall be equitably paid for such expense and the services involved.

Three per cent (3%) of the cost of construction shall be added to the maximum rate of compensation, as above set forth for alterations to existing buildings. All compensation payable under this act may be distributed and paid in accordance with the following schedule, to wit:

20% upon completion of studies and preliminary drawings 55% upon completion of working drawings and specifications 25% during construction, based on contract payment;

provided, the architect shall be paid at said times at the applicable rate of compensation for any work which is requested by the owner or its

duly authorized agent and within the scope of his authority to the extent authorized but abandoned by such owner in whole or in part.

History: En. Sec. 3, Ch. 190, L. 1953; amd. Sec. 2, Ch. 167, L. 1961.

CHAPTER 2

AUCTIONEERS AND AUCTION SALES

Section 66-201. Auctioneer's authority from the seller. 66-202. Auctioneer's authority from the bidder. 66-203. Auctioneer-authority and bond. 66-204. The bond-sureties, approval and filing. 66-205. Auctioneers ex officio. 66-206. Assistant—who may act and when. Auctioneers to designate places of business. 66-207. 66-208. To sell at no other place. Power of city authorities. Book for livestock. 66-209. 66-210. 66-211. Book of sales. 66-212. Commissions and penalty for overcharge. 66-213. Sale by auction defined. 66-214. Sale-when complete. 66-215. Withdrawal of bid. 66-216. Sale under written conditions. 66-217. Rights of buyer upon sale without reserve. By bidding.
Auctioneer's memorandum of sale. 66-218. 66-219. 66-220. 66-221. Definitions. 66-222. Unlawful to sell at public auction without first securing license. 66-223. Application for license-contents. 66-224. Bond—filing—liability on. 66-225. License fee—disposition. 66-226. Issuance of license—terms—record—form. 66-227. Inventory of merchandise sold and prices received—filing. Unlawful acts—penalty. 66-228.

- 66-201. (7976) Auctioneer's authority from the seller. An auctioneer, in the absence of special authority or usage to the contrary, has authority
 - 1. To sell by public auction to the highest bidder:

Powers of cities and towns not affected.

Exemptions from act.

- 2. To sell for each only, except such articles as are usually sold on credit at auction;
- 3. To warrant in like manner with other agents to sell according to section 2-130;
 - 4. To prescribe reasonable rules and terms of sale;
 - 5. To deliver the thing sold, upon payment of the price;
 - 6. To collect the price; and,

66-229.

66-230.

from the seller only as follows:

7. To do whatever else is necessary, or proper and usual, in the ordinary course of business, for effecting these purposes.

History: En. Sec. 3160, Civ. C. 1895; re-en. Sec. 5461, Rev. C. 1907; re-en. Sec. 7976, R. C. M. 1921. Cal. Civ. C. Sec. 2362. Field Civ. C. Sec. 1264. Cross-Reference

Acting as auctioneer without authority, sec. 94-1512.

Collateral References

Auctions and Auctioneers ∞6.
7 C.J.S. Auctions and Auctioneers § 6.

Withdrawal of property from auction sale. 37 ALR 2d 1049.

Implied or apparent authority of auctioneer selling personal property to make warranties. 40 ALR 2d 313.

Liability of auctioneer or clerk to buyer

Liability of auctioneer or clerk to buyer as to title, condition, or quality of property sold. 80 ALR 2d 1237.

66-202. (7977) Auctioneer's authority from the bidder. An auctioneer has authority from a bidder at the auction, as well as from the seller, to bind both by a memorandum of the contract, as prescribed in the chapters on sale.

History: En. Sec. 3161, Civ. C. 1895; re-en. Sec. 5462, Rev. C. 1907; re-en. Sec. 7977, R. C. M. 1921. Cal. Civ. C. Sec. 2363. Field Civ. C. Sec. 1265.

Collateral References

5 Am. Jur. 451, Auctions, §§ 8-13.

66-203. (4147) Auctioneer—authority and bond. Any citizen of this state may become an auctioneer, and be authorized to sell real or personal property at public auction in any county in this state, on giving a bond in accordance with the provisions of this chapter for the faithful performance of his duties.

History: En. Sec. 3400, Pol. C. 1895; re-en. Sec. 2119, Rev. C. 1907; amd. Sec. 1, Ch. 15, L. 1921; re-en. Sec. 4147, R. C. M. 1921. Cal. Pol. C. Sec. 3284.

Collateral References

Auctions and Auctioneers \$3. 7 C.J.S. Auctions and Auctioneers §3. See generally, 5 Am. Jur. 445, Auctions.

Regulations affecting auctions or auctioneers. 31 ALR 299; 39 ALR 773 and 111 ALR 473.

Validity of statute or ordinance fixing closing hours for auctions. 55 ALR 242.

Presence of chattels at place of sale as a condition of sale by public auction. 69 ALR 1194.

Liability of auctioneer or clerk of auction to buyer in respect of title, condition, or quality of property sold. 80 ALR 2d 1237.

66-204. (4148) The bond—sureties, approval and filing. The bond must be conditioned to be paid to the state of Montana, with one or more sureties, in the sum of five thousand dollars, and approved by the county clerk of the county in which the auctioneer resides, and filed in his office.

History: En. Sec. 3401, Pol. C. 1895; re-en. Sec. 2120, Rev. C. 1907; re-en. Sec. 4148, R. C. M. 1921. Cal. Pol. C. Sec. 3285. Collateral References

Auctions and Auctioneers ₹ 5.
7 C.J.S. Auctions and Auctioneers § 16.

66-205. (4149) Auctioneers ex efficio. In any city or town where there is no auctioneer, the sheriff or a constable thereof is ex officio auctioneer, and is permitted to sell any property, real or personal, at public auction; and for any delinquency as such ex officio auctioneer he is liable on his official bond.

History: En. Sec. 3407, Pol. C. 1895; re-en. Sec. 2126, Rev. C. 1907; re-en. Sec. 4149, R. C. M. 1921. Cal. Pol. C. Sec. 3291.

66-206. (4150) Assistant—who may act and when. Every auctioneer, in case of inability to attend an auction by reason of sickness, or the performance of any duty imposed upon him by law, or during a temporary absence from the city or county within which he is auctioneer, may employ a copartner or clerk to hold such auction in his name and behalf, such employee to take and file with the county clerk of the county an affidavit

faithfully to perform the duties of auctioneer. But any auctioneer may employ a crier at any sale, for whose acts he shall be responsible.

History: En. Sec. 3408, Pol. C. 1895; re-en. Sec. 2127, Rev. C. 1907; re-en. Sec. 4150, R. C. M. 1921. Cal. Pol. C. Sec. 3292.

66-207. (4151) Auctioneers to designate places of business. No auctioneer in any city of this state must have at one time more than one place for holding auction; and every such auctioneer, before acting as such, must file with the clerk of the county in which said city is situated a writing signed by him, designating such place, and naming therein the partners, if any, engaged with him in business.

History: En. Sec. 3420, Pol. C. 1895; re-en. Sec. 2128, Rev. C. 1907; re-en. Sec. 4151, R. C. M. 1921. Cal. Pol. C. Sec. 3302.

Collateral References

Auctions and Auctioneers 7. 7 C.J.S. Auctions and Auctioneers § 7.

66-208. (4152) **To sell at no other place.** No auctioneer must expose to sale any articles at any other place than that so designated, except goods sold in original packages as imported, household furniture, and such bulky articles as have been usually sold in warehouses, or in the public streets, or on the wharves.

History: En. Sec. 3421, Pol. C. 1895; re-en. Sec. 2129, Rev. C. 1907; re-en. Sec. 4152, R. C. M. 1921. Cal. Pol. C. Sec. 3303.

66-209. (4153) Power of city authorities. The city council or other corresponding authority of each city may designate such place or places therein for the sale by auction of horses, carriages, and household furniture, as they deem expedient.

History: En. Sec. 3422, Pol. C. 1895; re-en. Sec. 2130, Rev. C. 1907; re-en. Sec. 4153, R. C. M. 1921. Cal. Pol. C. Sec. 3304.

Collateral References

Auctions and Auctioneers \$\infty\$ 1. 7 C.J.S. Auctions and Auctioneers, § 2. See generally, 5 Am. Jur. 445, Auctions.

Regulations affecting auctions or auctioneers. 31 ALR 299; 39 ALR 773 and 111 ALR 473.

Validity of statute or ordinance fixing closing hours for auctions. 55 ALR 242.

Presence of chattels at place of sale as a condition of sale by public auction. 69 ALR 1194.

66-210. (4154) Book for livestock. Every auctioneer who sells any animal of the horse kind, or any mules, must keep a book, in which he must register the name of each and every person bringing or offering any horse or mule to be sold, together with the marks and brands. The book is a public record, subject to the inspection of any person desiring to inspect the same.

History: Earlier acts were Secs. 1 and 2, p. 372, Cod. Stat. 1871; Secs. 2 and 3, 5th Div. Rev. Stat. 1879; Secs. 25 and 26, 5th Div. Comp. Stat. 1887. This section en. Sec. 3423, Pol. C. 1895; re-en. Sec. 2131,

Rev. C. 1907; re-en. Sec. 4154, R. C. M. 1921. Cal. Pol. C. Sec. 3305.

Cross-Reference

Failure to keep record of sales, sec. 94-35-196.

66-211. (4155) **Book of sales.** Each auctioneer must keep a book, in which he must enter all sales, showing the name of the owner of the goods sold, to whom sold, and the amount paid, and the date of each sale, which

book must at all times be open for the inspection of any person interested therein.

History: En. Sec. 3424, Pol. C. 1895; re-en. Sec. 2132, Rev. C. 1907; re-en. Sec. 4155, R. C. M. 1921. Cal. Pol. C. Sec. 3306.

66-212. (4156) Commissions and penalty for overcharge. No auctioneer must demand or receive a higher compensation for his services than a commission of one per cent on the amount of any sales, public or private, made by him, unless by virtue of a previous agreement in writing between him and the owner or consignee. Every auctioneer who violates this section, in addition to the criminal penalty, forfeits to the party aggrieved two hundred and fifty dollars, and must refund the excess of charge.

History: En. Sec. 3425, Pol. C. 1895; re-en. Sec. 2133, Rev. C. 1907; re-en. Sec. 4156, R. C. M. 1921, Cal. Pol. C. Sec. 3309.

Collateral References

Auctions and Auctioneers \$\sim 10. 7 C.J.S. Auctions and Auctioneers \\$\\$ 9-12.

66-213. (7625) **Sale by auction defined.** A sale by auction is a sale by public outcry to the highest bidder on the spot.

History: En. Sec. 2410, Civ. C. 1895; re-en. Sec. 5122, Rev. C. 1907; re-en. Sec. 7625, R. C. M. 1921. Cal. Civ. C. Sec. 1792. Field Civ. C. Sec. 896.

Collateral References

Auctions and Auctioneers © 1 et seq. 7 C.J.S. Auctions and Auctioneers § 2 et seq. 5 Am. Jur. 453, Auctions, §§14-27.

66-214. (7626) Sale—when complete. A sale by auction is complete when the auctioneer publicly announces, by the fall of his hammer, or in any other customary manner, that the thing is sold.

History: En. Sec. 2411, Civ. C. 1895; re-en. Sec. 5123, Rev. C. 1907; re-en. Sec. 7626, R. C. M. 1921. Cal. Civ. C. Sec. 1793. Field Civ. C. Sec. 897.

Collateral References

Auctions and Auctioneers € 7. 7 C.J.S. Auctions and Auctioneers § 12.

66-215. (7627) Withdrawal of bid. Until the announcement mentioned in the last section has been made, any bidder may withdraw his bid, if he does so in a manner reasonably sufficient to bring it to the notice of the auctioneer.

History: En. Sec. 2412, Civ. C. 1895; 7627, R. C. M. 1921. Cal. Civ. C. Sec. 1794. re-en. Sec. 5124, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 898.

66-216. (7628) Sale under written conditions. When a sale by auction is made upon written or printed conditions, such conditions cannot be modified by any oral declaration of the auctioneer, except so far as they are for his own protection.

History: En. Sec. 2413, Civ. C. 1895; re-en. Sec. 5125, Rev. C. 1907; re-en. Sec. 7628, R. C. M. 1921. Cal. Civ. C. Sec. 1795. Field Civ. C. Sec. 899.

Collateral References

Auctions and Auctioneers § 8. 7 C.J.S. Auctions and Auctioneers § 8.

66-217. (7629) Rights of buyer upon sale without reserve. If, at a sale by auction, the auctioneer, having authority to do so, publicly announces that the sale will be without reserve, or makes any announcement equivalent thereto, the highest bidder in good faith has an absolute right to the com-

pletion of the sale to him; and, upon such a sale, bids by the seller, or any agent for him, are void.

History: En. Sec. 2414, Civ. C. 1895; 7629, R. C. M. 1921. Cal. Civ. C. Sec. 1796. re-en. Sec. 5126, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 900.

66-218. (7630) **By bidding.** The employment by a seller of any person to bid at a sale by auction, without the knowledge of the buyer, without an intention on the part of such bidder to buy, and on the part of the seller to enforce his bid, is a fraud upon the buyer, which entitles him to rescind his purchase.

History: En. Sec. 2415, Civ. C. 1895; re-en. Sec. 5127, Rev. C. 1907; re-en. Sec. 7630, R. C. M. 1921. Cal. Civ. C. Sec. 1797. Field Civ. C. Sec. 901.

7 C.J.S. Auctions and Auctioneers § 7. 5 Am. Jur. 460, Auctions, §§ 22-25.

Effect on auction sale of by-bidding or puffing. 46 ALR 122.

Collateral References

Auctions and Auctioneers \$\infty 7.

66-219. (7631) Auctioneer's memorandum of sale. When property is sold by auction, an entry made by the auctioneer, in his sale book, at the time of the sale, specifying the name of the person for whom he sells, the thing sold, the price, the terms of sale, and the name of the buyer, binds both the parties in the same manner as if made by themselves.

History: En. Sec. 2416, Civ. C. 1895; re-en. Sec. 5128, Rev. C. 1907; re-en. Sec. 7631, R. C. M. 1921. Cal. Civ. C. Sec. 1798. Field Civ. C. Sec. 902.

Cross-Reference

Sales book entries as sufficient memorandum for statute of frauds, sec. 13-606.

66-220. Short title. This act shall be known as the "Public Auction Law."

History: En. Sec. 1, Ch. 111, L. 1955.

cial Code, 21 Mont. L. Rev. 1, 57 (Fall 1959).

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66-221. Definitions. The words "public auction sales" when used in this act, shall mean the offering for sale or selling of new goods, wares or merchandise to the highest bidder or offering for sale or selling of new goods, wares or merchandise at a high price and then offering the same at successive lower prices until a buyer is secured, in the manner defined and set out in sections 66-213 and 66-214.

The words "new goods, wares and merchandise" when used in this act, shall mean and include all goods, wares and merchandise not previously sold at retail.

History: En. Sec. 2, Ch. 111, L. 1955.

66-222. Unlawful to sell at public auction without first securing license. It shall be unlawful for any person, firm, association or corporation to sell, dispose of, or offer for sale at public auction in the state of Montana any new goods, wares or merchandise, unless such person, firm, association or corporation, and the owners of such new goods, wares or merchandise to be offered for sale or sold if such are not owned by the vendors, shall have first secured a license as herein provided and shall have complied with the other requirements of this act herein set forth.

History: En. Sec. 3, Ch. 111, L. 1955.

- 66-223. Application for license—contents. Any person, firm, association or corporation desiring to offer any new goods, wares or merchandise for sale at public auction shall file application for a license for that purpose with the treasurer of the county in this state in which the said auction is proposed to be held. The application shall be filed not less than ten (10) full days prior to the date the said auction is to be held. The application shall state the following facts:
- (a) The name, residence and post-office address of the person, firm, association or corporation making the application, and if a firm, association or corporation, the name and address of the members of the firm or officers of the association or corporation, as the case may be.
- (b) If the applicant is a corporation then there shall be stated on the application form the date of incorporation, the state of incorporation and if for a corporation formed in a state other than the state of Montana the date on which such corporation qualified to do business as a foreign corporation in the state of Montana.
- (c) The name, residence and post-office address of the auctioneer who will conduct such auction sale.
- (d) A detailed inventory and description of all such new goods, wares or merchandise to be offered for sale at such auction which inventory shall set forth the cost to the applicant of the several items contained in such inventory.
- (e) Attached to the application shall be copies of notices, which ten (10) days before the said application has been filed, shall have been mailed registered mail by the proposed seller to the state board of equalization of the state of Montana or such other department as may be charged with the duty of collecting gross income taxes, corporation licenses, or such other taxes of a comparable nature, and to the assessor of the county in which said auction is to be held. The said notices must state the precise time and place where the said auction is to be held, the approximate value of the new goods, wares or merchandise to be offered for sale or sold and such other information as the said state board of equalization or the said county assessor may request.
 - (f) The number of days on which said auction will be held.
 - (g) The said application shall be verified.

History: En. Sec. 4, Ch. 111, L. 1955. Persons eligible for license. 31 ALR 299; 39 ALR 773 and 111 ALR 473.

5 Am. Jur. 447, §§ 3 et seq.

66-224. Bond—filing—liability on. At the time of filing said application, and as a part thereof, the applicant shall file and deposit with the said county treasurer a bond, with sureties to be approved by the said county treasurer, in the penal sum of two (2) times the value of the merchandise proposed to be offered for sale at public auction as shown by the inventory filed, running to the state of Montana, and for the use and benefit of any purchaser of any such new goods, wares or merchandise at the said auction who might have a cause of action of any nature arising from or out of a sale or sales at such auction or against the applicant or against the auctioneer; the said bond shall be further conditioned on the payment

by the applicant of all taxes that may be payable by or due from, the applicant to the state of Montana or any department thereof or any subdivision of the state of Montana, municipal or otherwise, the payment of any fines that may be assessed by any court against the applicant or against the auctioneer for violation of the provisions of this act, and the satisfaction of all causes of action commenced within one (1) year from the date that such sale is made at any such auction and arising therefrom, provided, however, that the aggregate liability of the surety for all said taxes, fines, and causes of action shall in no event exceed the sum of such bond but there shall be no limitation of liability against the owners of the new goods, wares and merchandise or the auctioneer or the applicant for the license.

In such bond the applicant and surety shall appoint the treasurer of said county in which said bond is filed the agent of the applicant and the surety for the service of process. At the time that said bond is filed and deposited with the county treasurer, as herein provided, the auctioneer shall appoint the said county treasurer the agent of the auctioneer for the service of process. In the event of such service of process, the agent on whom such service is made shall, within five (5) days after the service, mail by ordinary mail a true copy of the process served upon him to each party for whom he has been served, addressed to the last known address of such party. Failure to so mail said copy shall not, however, affect the court's jurisdiction.

The state of Montana or any department or subdivision, municipal or otherwise, thereof, or any person having a cause of action arising out of any sale of such new goods, wares or merchandise may join the applicant and the surety on such bond and the auctioneer in the same action, or may in such action sue either such applicant or the surety or the auctioneer alone.

History: En Sec. 5, Ch. 111, L. 1955.

66-225. License fee—disposition. The applicant desiring to file an application with the treasurer for a license to conduct a public auction shall pay to the treasurer of such county in which the said application is made, a license fee of fifty dollars (\$50.00) first day and twenty-five dollars (\$25.00) per day for each succeeding day that he proposes to conduct a public auction. And such applicant shall thereupon file the treasurer's receipt for such payment with the treasurer of the said county with whom the said application is filed. All moneys paid in accordance herewith shall be deposited by the county treasurer to the credit of the general fund of the county to which it is paid.

History: En. Sec. 6, Ch. 111, L. 1955.

66-226. Issuance of license—terms—record—form. Upon the filing of such application and after the applicant has established that he has fully complied with all the provisions of this act, the treasurer of said county, shall issue to the applicant a license authorizing the said applicant to conduct a public auction as proposed in said application; such license shall not be transferable and shall be valid only in the county where issued and shall not be valid in any town or city which has enacted an ordinance

licensing public auction sales unless a license is also obtained from such city or town. No license shall be good for more than one (1) person, unless such persons shall be copartners, nor for more than one (1) place in said county.

The treasurer of said county shall keep a record of such licenses in a book provided for that purpose, which shall at all times be open to public inspection.

No particular form of license shall be required to be issued by said treasurer. However, any license issued shall state the name of the person, firm, association or corporation which is licensed, the precise place at which such auction sale is to be held and the number of days for which the license is issued.

History: En. Sec. 7, Ch. 111, L. 1955.

66-227. Inventory of merchandise sold and prices received—filing. Within ten (10) days after the last day of said auction sale, the applicant shall file in duplicate with the county treasurer of the county wherein said auction sale was held, an inventory of all merchandise sold at such auction and the price received therefor, which inventory shall be verified by the person who filed the application for the license with the said treasurer. The county treasurer shall immediately after receiving such report and inventory forward a copy thereof to the state board of equalization.

History: En. Sec. 8, Ch. 111, L. 1955.

66-228. Unlawful acts—penalty. Every person, firm, association or corporation, either as principal or agent, who shall in any manner engage in, or conduct a public auction sale, without having first obtained a license as hereinbefore provided, or who shall knowingly advertise, represent or hold forth any sale of goods, wares or merchandise to be conducted contrary to the provisions of this act shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be fined in any sum not less than two hundred dollars (\$200) and not more than one thousand dollars (\$1,000.00), to which may be added imprisonment of not less than thirty (30) days and not more than one hundred and eighty (180) days.

History: En. Sec. 9, Ch. 111, L. 1955.

66-229. Exemptions from act. The provisions of this act shall not extend to the sale at public auction of livestock, farm machinery or farm produce or other items commonly sold at farm sales, or to auction sales by individuals of new merchandise, who maintain an established retail sales place of business and inventory of goods in the county in which the sale is to be held, and to auction sales under the direction of any court or court officers as may be required by law nor shall it apply to sales made to dealers by commercial travelers or selling agents in the usual course of business, nor to a bona fide sale of goods, wares and merchandise by sample for future delivery, or by sales made by sheriffs, constables or other public officers selling goods, wares and merchandise according to law, nor to bona fide assignees or receivers appointed in this state selling goods, wares and merchandise for the benefit of creditors.

History: En. Sec. 10, Ch. 111, L. 1955; amd. Sec. 1, Ch. 225, L. 1959.

66-230. Powers of cities and towns not affected. The towns and cities of the state of Montana are hereby given full power and authority to tax, license and regulate persons, firms, associations or corporations engaging in or desiring to engage in public auctions, and may require a license and charge a fee therefor; but such license fee shall not exceed the amount provided in this act for a county license but shall be in addition thereto and such towns and cities may provide for penalties for violations of said ordinance. A city or town license shall not be in lieu of a county license.

History: En. Sec. 11, Ch. 111, L. 1955.

CHAPTER 3

ATTORNEYS

See Secs. 93-2101 to 93-2121.

CHAPTER 4

BARBERS AND BARBER SHOPS

Section 66-401. Sanitation of barber shops, barber schools and barber colleges and definition of term barber shop.

66-402. Practice of barbering defined.

66-403. Licensing and registration of barbers, barber shops, barber schools and barber colleges, prohibiting barber schools and colleges from charging patrons for services.

66-404. Present practitioners.

66-405. Display of certificate and license.

Board of barber examiners—creation, qualifications, appointment and 66-406. term of office.

66-407. Officers, official seal, bond.

Compensation, funds and reports. 66-408.

66-409. Powers and duties.

66-410. Penalty.

Fees to be paid by apprentices, students, barbers and barber shops. 66-411.

Barber's registration and license. 66-412.

- 66-401. (3228.19) Sanitation of barber shops, barber schools and barber colleges and definition of term barber shop. All barber shops, barber schools and barber colleges shall be operated and maintained in a sanitary condition so as to preserve the public health and prevent the spread of disease. The board of barber examiners and the state board of health of the state of Montana are hereby empowered to make and enforce all reasonable rules and regulations so as to preserve the public health and prevent the spread of disease. No barber, or barber apprentice, shall receive a certificate of registration, nor a renewal of same, until he has presented to the board of barber examiners a physician's certificate showing him to be free of physical ailments that would tend to endanger the health of the public, and any person practicing barbering without a certificate of registration is guilty of a violation of this act.
- It shall be unlawful for any barber, barber apprentice or student of barbering to practice the occupation of a barber, or do any barber work while he has an infectious, contagious or communicable disease that would endanger the health of the public.
- If a barber, or barber apprentice, shall, after securing his certificate contract a communicable, infectious or contagious disease, endangering

the public health, the board shall upon proof of same revoke or suspend his certificate of registration until such time as the board shall have satisfactory proof that such barber, or barber apprentice, is no longer afflicted with such communicable, infectious or contagious disease.

(c) The term "barber shop" as used herein is defined as a place where any person or persons carry on, engage in, practice or causes to be carried on, engaged in or practiced the business of barbering as the same is defined in sections 66-401 to 66-412.

History: En. Sec. 1, Ch. 127, L. 1929; amd. Sec. 1, Ch. 183, L. 1937.

Cross-Reference

Conducting business on Sunday unlawful, secs. 94-3511, 94-3512.

Constitutionality

Sections 66-401 through 66-412 requiring the licensing of barbers held within the police powers of the state and not unconstitutional as discriminatory because exempting those practicing barbering within the state at the time of its passage but requiring a license of defendant who was so practicing in another state at that date. State v. Bays, 100 M 125, 126, 47 P 2d 50.

Collateral References

Health © 23. 39 C.J.S. Health § 37 et seq.

66-402. (3228.20) Practice of barbering defined. Any one or any combination of the following practices, when done upon the human body for tonsorial purposes, and not for the treatment of disease or physical or mental ailments and when done for payment, either directly or indirectly, constitutes the practice of barbering:

Shaving or trimming the beard.

Cutting the hair.

Giving facial or scalp massage, or treatment with oils, creams, lotions or other preparations, either by hand or mechanical appliances.

Singeing or shampooing the hair or applying hair tonic; or dying the hair of male persons.

Applying cosmetic preparations, antiseptics, powders, oils, lotions to scalp, face or neck.

History: En. Sec. 2, Ch. 127, L. 1929; amd. Sec. 2, Ch. 183, L. 1937.

53 C.J.S. Licenses § 30.

Collateral References

Liability of barber or beauty specialist for injury to patron. 14 ALR 2d 860.

Licenses 🖘 11(1).

- 66-403. (3228.21) Licensing and registration of barbers, barber shops, barber schools and barber colleges, prohibiting barber schools and colleges from charging patrons for services. A. A person is qualified to receive a certificate of registration to practice barbering:
- (1) Who has practiced as a registered apprentice for a period of eighteen (18) months under the immediate personal supervision of a registered barber; and who has passed a satisfactory examination conducted by the board of barber examiners to determine his or her fitness to practice barbering as defined by section 66-402.
- (2) Who is a graduate of a standardized school of barbering, (having a curriculum as adopted by the national educational council of barber examiners, and who has attended such school for the time prescribed herein and which school of barbering has been approved by the board of barber

examiners of the state of Montana), and who has passed a satisfactory and practical examination conducted by the said board of barber examiners to determine his or her fitness to practice barbering.

(3) Who has served as an apprentice. An apprentice, for the purpose of this act, is a person who receives instruction in an approved barber school, or college, or from a barber authorized to practice barbering in the state of Montana.

Every apprentice must file with the board of barber examiners a statement in writing showing the name and place of business of his or her instructor, or school, the date of commencement of the apprenticeship, and the full name and age of said apprentice, and shall pay to the board of barber examiners a fee of four dollars (\$4.00), whereupon the board of barber examiners shall issue the said apprentice a card.

- B. No registered apprentice may independently practice, or engage in the practice of barbering; provided, however, he may do any and all of the acts which constitute the practice of barbering when so done under the immediate personal supervision of a registered barber.
- C. No school, or college, of barbering shall be approved by the board of barber examiners unless it teaches the curriculum of the standardized schools approved by the national educational council of barber examiners. Students of said schools or colleges may, after attending such schools for a period of six (6) months, make application to the board of barber examiners for an apprenticeship certificate to practice barbering under the immediate personal supervision of a licensed barber for the period of one (1) year, after which time said students may then make application to take the examination for a barber's certificate of registration.
- D. A barber shop, school or college must be conducted at a fixed place of establishment; no person or corporation shall open or maintain a barber shop, school or college, or hold himself or itself out as engaging in or conducting a barber shop, school or college, unless first licensed so to do by the board of barber examiners. Every barber school, or college, operating within the state of Montana must be in charge of a person who has had ten (10) years' continuous experience as a barber, providing that the owner of such school, or college shall first secure from the board of barber examiners a permit to operate on payment of an annual license fee of fifty dollars (\$50.00), and shall keep said permit prominently displayed, and shall, before commencing business file with the secretary of state a bond to the state of Montana, which bond shall be approved by the attorney general, in the sum of two thousand dollars (\$2,000.00) conditioned upon the faithful compliance of said barber school, or college, with all the provisions of this chapter; and to pay all judgments that may be obtained against said schools, or colleges, or the owners thereof on account of fraud, misrepresentation or deceit practiced by them, or by their agents; provided, further, that barber schools, or barber colleges shall not charge patrons for barbering services rendered; provided, further, that all barber schools, or colleges shall keep prominently displayed a substantial sign as a barber school, or barber college. Provided, further, that all barber schools, or colleges, upon receiving students shall immediately apply to the board of barber examiners

for student permits upon blank forms provided by the board of barber examiners for such purposes.

An application for a barber shop, school or college license shall be in writing and verified on a form provided by the board of barber examiners. Upon receipt of an application for a license hereunder, and upon payment of the initial inspection fee, said board of barber examiners shall cause an investigation and inspection to be made as to the character of the applicant, and upon proper notice and after proper hearing shall report its findings to the secretary of the board of barber examiners, who shall grant a license, if the board of barber examiners finds that the applicant is of good character, and that the proposed barber shop, school or college is equipped and will be conducted as required by this act. Every application must be granted or refused within thirty (30) days from the date of filing of such application or within fifteen (15) days after the close of the hearing upon the application in case a hearing is held.

- E. No barber shop license shall be issued in this state to anyone except one who holds a regular valid barber's certificate as provided for by this act, and no barber shop shall be maintained or conducted in this state except by one who holds a barber shop license issued by the board of barber examiners as provided by this act, and this certificate shall not be transferable as to person or place.
- F. Before a license is issued to conduct a barber shop, school or college which shall be established in this state on or after the date this act goes into effect, such barber shop, school or college must be inspected and approved by the board of barber examiners and shall meet with the following requirements: (1) Must have both hot and cold running water connected with city water supply. In villages or towns where running water is not available, hot water tanks shall have not less than two (2) gallon capacity with gravity pressure. Waste water shall be disposed of through some system, carrying it away from the building. be done by sewer connections, or in a manner meeting with the requirements of the state department of health rules and regulations, city ordinances, and having the approval of the city or village board of health, as required by law. (2) The headrest of every barber chair must be equipped so that each customer will be supplied with clean fresh paper or towel before its use for any person. (3) Must have a closed cabinet for each chair, to keep instruments in when not in use, and must have proper sterilization equipment for immersing instruments before use on each customer. (4) Must have sufficient number of towels so that each customer will be served with a clean laundered towel. (5) Must be well lighted, well ventilated, and kept in a clean, orderly and sanitary condition at all times. (6) Must pay to the board of barber examiners the required fee.
- G. All barber shops, barber schools or colleges shall be open for inspection at any time during business hours, to any member of the board, or its agents or assistants, and it shall be the duty of every owner or manager of a barber shop licensed under this act to make certain that each barber employed therein holds a certificate to practice barbering in Montana, and that all employees observe the sanitary rules of the state department of health and the board of barber examiners and report to the

board of barber examiners the name of any person practicing barbering therein, who has a communicable disease.

- H. The board of barber examiners may either refuse to issue or renew, or may suspend or revoke any barber shop or barber school or college license for any one or combination of the following causes: (1) The violation of any of the provisions of subdivisions 1, 2, 3, 4, and 5 of subsection F of this section, subsection G of this section, and section 66-405; (2) Conviction of a felony, shown by a certified copy of the record of the court of conviction; (3) Gross malpractice or gross incompetency; (4) Continued practice by a person knowingly having an infectious or contagious disease; (5) Advertising by means of knowingly false or deceptive statements; (6) Advertising, practicing or attempting to practice under a trade name other than one's own; (7) Habitual drunkenness or habitual addiction to the use of morphine, cocaine, or other habit-forming drugs; (8) The commission of any of the offenses described in section 66-409.
- Any applicant whose license has been refused, suspended or revoked by the board of barber examiners under this act may within ten (10) days of such action file a petition in the district court in the county in which the applicant resides. The licensee shall be named as plaintiff and the board of barber examiners as defendant. Said court shall have jurisdiction after notice to the board of barber examiners to hear and determine said petition in a summary manner, and to reverse, vacate or modify the order of the board of barber examiners complained of, if upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable. The trial of the district court upon such an appeal shall be de novo. The decision of the board of barber examiners shall not be stayed by the proceedings on appeal and such appeal shall not operate to restore the right of the licensee to operate a barber shop pending such appeal. The attorney general shall defend said action of the board of barber examiners on behalf of the state; but the county attorney of the county where the petition is filed, at the request of the attorney general, shall appear and defend such action.

History: En. Sec. 3, Ch. 127, L. 1929; amd. Sec. 1, Ch. 18, L. 1931; amd. Sec. 3, Ch. 183, L. 1937; amd. Sec. 1, Ch. 150, L. 1939; amd. Sec. 1, Ch. 237, L. 1957.

Collateral References

Licenses 20.
53 C.J.S. Licenses § 32.
7 Am. Jur. 616, Barbers and Beauty Specialists, § 7.

66-404. (3228.22) **Present practitioners.** Any person engaged in the practice of barbering in this state at the time this act goes into effect, provided he furnish a satisfactory physician's certificate, approved by the state board of health, shall be granted a certificate of registration as registered barber without other examination, provided further that such person shall apply for a certificate on or before August 1, 1929.

Any barber shop, school or college established, maintained and operated in this state prior to the date this act goes into effect, provided its owner or manager furnish satisfactory evidence of compliance with the laws heretofore governing barber shops, schools or colleges in this state, shall be granted a license, provided further, that such owner or manager shall apply for such license and pay the required fee on or before May 31, 1939.

Any change in the ownership or management of a barber shop, school or college, on or after the date this act goes into effect, whether by sale or otherwise, shall render such barber shop, school, or college subject to all the provisions of section 66-403 and section 66-405.

History: En. Sec. 4, Ch. 127, L. 1929; amd. Sec. 2, Ch. 150, L. 1939.

Constitutionality

This and other sections of Ch. 127, Laws 1929, licensing the barber business, which exempted barbers practicing in the state on the date the act became effective but

did not exempt those practicing in other states, do not, as to one who at the effective date of the act, was engaged in the business of barbering in a foreign state, violate the equal protection clause of the 4th amendment or the due process clause of federal and state constitutions. State v. Bays, 100 M 125, 47 P 2d 50.

66-405. (3228.23) **Display of certificate and license.** Every holder of a certificate of registration shall display it in a conspicuous place, adjacent to or near his or her work chair.

Every license to operate a barber shop, school or college shall specify the name of the licensee and shall be kept in a conspicuous place in the barber shop, school or college. No barber shop, school or college shall be conducted or held forth as being conducted under any name except the name appearing as licensee on the license issued by the board of barber examiners.

Every barber shop shall display a schedule of prices in a conspicuous place.

History: En. Sec. 5, Ch. 127, L. 1929; amd. Sec. 3, Ch. 150, L. 1939.

Collateral References Licenses \$25. 53 C.J.S. Licenses \$35.

66-406. (3228.24) Board of barber examiners—creation, qualifications, appointment and term of office. A board to be known as a board of barber examiners is established to consist of three (3) members appointed by the governor. Each member shall be a practical barber who has followed the occupation of barber in this state for at least five (5) years immediately prior to his appointment. The membership of the first board of barber examiners shall serve for three (3) years, two (2) years and one (1) year respectively as appointed, and members appointed thereafter shall serve for three (3) years. The governor may remove a member for cause.

History: En. Sec. 6, Ch. 127, L. 1929.

Collateral References

Licenses 21.
53 C.J.S. Licenses § 37.
7 Am. Tur. 615 Barbara and

7 Am. Jur. 615, Barbers and Beauty Specialists, § 4.

Constitutionality of statute regulating barbers. 20 ALR 1111 and 98 ALR 1088. Places and persons within purview of statutes or ordinances regulating barbers. 31 ALR 433 and 59 ALR 543.

66-407. (3228.25) Officers, official seal, bond. The board shall elect a president, secretary and treasurer. It shall adopt and use a common seal for the authentication of its orders and records. The secretary shall keep a record of all proceedings of the board and shall at least once a month turn over to the treasurer of the board all moneys collected. The secretary and treasurer shall each furnish a surety bond in the sum of five thousand dollars (\$5,000.00), for the faithful performance of his duties; said bond to be filed with the secretary of state and shall be approved by the governor.

History: En. Sec. 7, Ch. 127, L. 1929.

66-408. (3228.26) **Compensation, funds and reports.** Each member of the board shall receive a compensation of fifteen dollars (\$15.00) per day while attending board meetings together with legitimate and necessary expenses incurred in attending the meeting of said board.

The board of barber examiners shall be self-sustaining financially and no funds of the state shall be paid for the operation and maintenance of said board. The disbursements of said board shall be paid upon the warrant of the president and secretary.

The board shall make an annual report of its proceedings and moneys expended by it to the governor of the state for the year ending on the 31st day of December preceding the making of said report.

History: En. Sec. 8, Ch. 127, L. 1929; amd. Sec. 2, Ch. 237, L. 1957.

- 66-409. (3228.27) Powers and duties. (1) The board of barber examiners shall conduct practical examinations of applicants for certificates of registration to practice as registered barbers, not less than four (4) times each year at such time and places as the board of barber examiners may determine. Said examination shall cover the fundamentals of barbering, dermatology and sanitation. The board of barber examiners shall issue all certificates of registration. The board of barber examiners may, at its discretion, appoint inspectors with authority to inspect barber shops, their compensation to be the same as provided for members of the board of barber examiners while engaged in said duties.
- The board of barber examiners shall have power to approve price agreements, establishing minimum prices for barber work, signed and submitted to the board of barber examiners by any organized group or groups of at least 75 per cent of the barbers in any city or town, within the state of Montana, should the board of barber examiners, after ascertaining by such investigations and proofs as the condition permits and requires, find that such price agreement is just and under varying conditions will best protect the public health and safety by affording a sufficient minimum price for barber work to enable the barbers to furnish modern and healthful services and appliances so as to minimize the danger to the public health incident to such work. For the purpose of this act, a city or town shall be deemed to include, in addition to the territory within its legal limits, the territory adjacent to it and lying within three miles of said legal limits. In determining whether any such price agreement is just and will best protect the public health and safety, the board shall take into consideration all conditions affecting the barber business in its relation to the public health and safety.
- (3) In determining reasonable minimum prices the board of barber examiners shall take into consideration the necessary cost incurred in the city or town in maintaining a barber shop in a clean, healthful and sanitary condition.
- (4) The board of barber examiners, after making such investigation, shall fix by official order the minimum price for all work usually performed in a barber shop within the city or town in which such price agreement has been signed. The board of barber examiners may upon the petition of 50%

of the barbers of the said city or town readjust the minimum prices and such new prices must be approved by 75% of the barbers in the city or town providing that any apprentice barber shall charge not less than 50% of the approved price in the said city or town. Provided, further, that this section shall not apply to students who have been enrolled less than six months in any barber college in the state of Montana or until they become apprentice barbers.

The board of barber examiners shall have authority to make necessary rules and regulations for the administration of the provisions of this act not inconsistent with this act nor the laws of the state.

History: En. Sec. 9, Ch. 127, L. 1929; amd. Sec. 2, Ch. 18, L. 1931; amd. Sec. 4, Ch. 150, L. 1939.

66-410. (3228.28) Penalty. Any person practicing the occupation of a barber without first having obtained a license, as provided in this act, or any person knowingly employing a barber who has not obtained such a license, or any person who falsely pretends to be qualified to practice such occupation under this act, and any person who violates any of the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than twenty-five (\$25.00) dollars nor more than two hundred (\$200.00) dollars, or imprisonment in the county jail for not less than ten (10) days nor more than ninety (90) days, or both. In addition to the penalty hereinbefore prescribed, the board of barber examiners may, after hearing, suspend or revoke any barber's certificate of registration, or license to operate a barber shop, school or college, or both by reason of any person willfully violating this act or persistently failing to conform to the lawful rules and regulations promulgated by the board of barber examiners.

History: En. Sec. 10, Ch. 127, L. 1929; amd. Sec. 2, Ch. 18, L. 1931; amd. Sec. 5, Ch. 150, L. 1939.

Collateral References Licenses@=38, 40. 53 C.J.S. Licenses §§ 44, 66.

- 66-411. (3228.29) Fees to be paid by apprentices, students, barbers and barber shops. A. The fee to be paid by an applicant for an examination to determine his or her fitness to receive a certificate of registration to practice barbering as defined in this act, shall be fifteen (\$15.00) dollars, and for the issuance of said certificate an additional four (\$4.00) dollars. The fee to be paid by an apprentice or student for a certificate of registration shall be the sum of four (\$4.00) dollars.
- B. Each person registered as a barber, or barber apprentice, shall on or before the first day of July of each year pay a license fee of four (\$4.00) dollars for the renewal of his or her certificate of registration, and if any barber, or barber apprentice, shall fail to have such certificate renewed on or before the first day of August of each year such barber, or barber apprentice, shall upon the renewal of said certificate of registration pay a penalty, or a restoration fee, of five (\$5.00) dollars, in addition to the regular fee of four (\$4.00) dollars provided for herein, and if a certificate of registration is not renewed within one year after date of expiration thereof, such barber, or barber apprentice, shall not be entitled to have such

certificate of registration renewed, or a new certificate of registration issued, without first applying for and taking the examination and paying the fees provided for by this section. Provided, further, however, that physically handicapped men and women, trained for the barber profession by the state bureau of civilian rehabilitation and certified by that department as having successfully completed a six (6) months' course in a reputable barber college will not be required to pay any fees, but will for a period of one (1) year immediately following their training be exempted from all except the sanitary provisions of the barber act, or any of its amendments, and provided, further, that no other or additional license, or fee, shall be imposed upon barbers, or barber apprentices, by any municipality or other subdivision of the state of Montana.

- C. In addition to the fees and charges now provided by existing law, all barber shops heretofore established, and which have been under the inspection of the board of barber examiners, shall pay an annual license fee of three (\$3.00) dollars. Barber shops hereafter established shall pay an initial inspection license fee of fifteen (\$15.00) dollars for the first year or portion thereof, and shall pay an annual license fee of three (\$3.00) dollars for each calendar year thereafter.
- D. All barber shops, schools or college licenses shall expire on the 31st day of May of each year, following the issuance of said license, and every owner or manager of a barber shop, school or college which continues in active operation shall annually, on or before May 31st renew his barber shop, school or college license and pay the required fee.

Every barber shop, school or college license which has not been renewed during the month of May in any year shall expire on the 31st day of May in that year, and for the restoration of an expired barber shop license the fee shall be ten (\$10.00) dollars, and for an expired barber school or college license, the fee shall be fifty-five (\$55.00) dollars.

History: En. Sec. 11, Ch. 127, L. 1929; amd. Sec. 4, Ch. 18, L. 1931; amd. Sec. 4, Ch. 183, L. 1937; amd. Sec. 6, Ch. 150, L. 1939; amd. Sec. 3, Ch. 237, L. 1957.

Collateral References Licenses 29. 53 C.J.S. Licenses § 48.

66-412. (3228.30) Barber's registration and license. After June 1, 1939, no person shall practice or attempt to practice barbering or serve or attempt to serve as a barber apprentice without first having received from the board of barber examiners a certificate of registration.

After June 1, 1939, it shall be unlawful to operate a barber shop, school or college unless it has first been duly licensed by the board under the provisions of this act.

History: En. Sec. 12, Ch. 127, L. 1929; amd. Sec. 7, Ch. 150, L. 1939.

53 C.J.S. Licenses § 59. 7 Am. Jur. 616, Barber and Beauty Specialists, § 7.

Collateral References

Licenses 39.

CHAPTER 5

CHIROPRACTIC—REGULATION OF PRACTICE

- State board of chiropractic examiners created—qualifications of mem-Section 66-501.
 - Appointment of board-term of office-future appointments. 66-502.
 - Organization of board-meetings-powers and duties. 66-503.
 - Practicing without license—license without examination—temporary 66-504.
 - 66-505. Applications to practice—fees for license.
 - 66-506. Examinations—subjects embraced in.
 - 66-507. Definition of chiropractic.
 - 66-508. Duties of chiropractic practitioners.
 - 66-509. Rights and limitations governing practice.
 - 66-510. Refusal and revocation of license-proceedings-reinstatement.
 - 66-511. Recordation of license-failure or refusal to record.
 - Renewal.
 - 66-512. 66-513. Disposition of fees-receipts and disbursements-per diem and mileage.
 - Bond of treasurer-dismissal of members of board. 66-514. 66-515. Admission to practice of persons from other states.
 - Penalty for violation of act. 66-516.
 - 66-517. Limitations upon construction of act.
- (3138) State board of chiropractic examiners created—qualifications of members. There is hereby created and established a board to be known as the state board of chiropractic examiners, and said board shall be composed of three practicing chiropractors of integrity and ability, who shall be residents of the state of Montana, and who shall have practiced chiropractic continuously in the state of Montana for a period of at least one year. No two members of said board shall be graduated from the same school or college of chiropractic.

History: En. initiative measure, Nov. 1918; effective under governor's proclamation, Dec. 28, 1918; re-en. Sec. 3138, R. C. M. 1921.

Collateral References

Physicians and Surgeons 3. 70 C.J.S. Physicians and Surgeons § 11.

(3139) Appointment of board—term of office—future appointments. The governor of the state of Montana shall, within thirty days after the taking effect of this act, appoint three chiropractors, who shall possess the qualifications specified in section 66-501, to constitute the members of said board. Said members shall be so classified by the governor that the term of office of one shall expire in one year, one in two years, and one in three years from the date of appointment. Annually thereafter the governor shall appoint one member, who shall be a licensed chiropractic practitioner and possessed of the qualifications specified in section 66-501, to serve for a period of three years and shall fill all vacancies in said board caused by death or otherwise as soon as practicable.

History: En. initiative measure, Nov. tion, Dec. 28, 1918; re-en. Sec. 3139, R. C. 1918; effective under governor's proclama-M. 1921.

(3140) Organization of board—meetings—powers and duties. Said board of chiropractic examiners shall convene within thirty days after their appointment and elect annually a president, vice-president, and a secretary-treasurer from their membership.

The board shall hold a regular meeting on the first Tuesday of October in each year at the capital of the state, and shall hold special meetings at such times and places as the board, or a majority of the members thereof, may designate; provided, that not more than four meetings shall be held in any one year. A majority of the board shall constitute a quorum.

Said board shall have authority to administer oaths, take affidavits, summon witnesses, and take testimony as to matters coming within the scope of the board. They shall adopt a seal, which shall be affixed to all licenses issued by them, and shall from time to time adopt such rules and regulations as they deem proper and necessary for the performance of their duties, and they shall adopt a schedule of minimum educational requirements, not inconsistent with the provisions of this law, which shall be without prejudice, partiality, or discrimination as to the different schools of chiropractic. The secretary of said board shall keep a record of the proceedings of the board, which shall at all times be open to public inspection. Said board shall also keep on file with the secretary of state a copy of their rules and regulations for public inspection.

A license to practice chiropractic within this state shall be issued to the individual members of said board at the first meeting of said board upon payment of the regular fee as provided for in this act.

History: En. initiative measure, Nov. tion, Dec. 28, 1918; re-en. Sec. 3140, R. C. 1918; effective under governor's proclama- M. 1921.

66-504. (3141) Practicing without license—license without examination—temporary permits. It shall be unlawful for any person to practice chiropractic in this state without first obtaining a license as provided in this act; provided, however, that all persons practicing chiropractic within this state for three months prior to the passage of this law, and holding a diploma or certificate from a legally chartered school of chiropractic of good repute, may be licensed to practice chiropractic in this state by submitting to said board of chiropractic examiners said diploma or certificate, and satisfying said board that they are the legal holders thereof, or by taking the examination herein provided for at any regular or special meeting of said board; and, provided further, that when application for examination for license is regularly filed with the board, as provided in the next section, the board may issue to the applicant a temporary permit to practice, good until the next meeting of the board.

History: En. initiative measure, Nov. 1918; effective under governor's proclamation, Dec. 28, 1918; re-en. Sec. 3141, R. C. M. 1921.

Collateral References
Physicians and Surgeons 5, 6.

70 C.J.S. Physicians and Surgeons § 10 et seq.

66-505. (3142) Applications to practice—fees for license. Any person wishing to practice chiropractic in this state after March 15, 1951, shall make application to said board of chiropractic examiners through the secretary-treasurer thereof, and upon such form and in such manner as may be prescribed and directed by the board, at least fifteen (15) days prior to any meeting of said board. Each applicant shall be a graduate of a college

of chiropractic approved by said board of chiropractic examiners in which he shall have attended a course of study of four (4) school years of not less than nine (9) months each, and after March 15, 1959, shall present evidence showing completion of two (2) full academic years of college or university work from an institution acceptable to the Montana state board of education; provided, however, that those who are now duly licensed to practice chiropractic under the laws of the state of Montana shall not be affected by this provision. Application shall be made in writing and shall be sworn to by some officer authorized to administer oaths, and shall recite the history of applicant's educational qualifications, and how long he has studied chiropractic, of what school or college he is a graduate, and the length of time he has been engaged in practice, accompanying the same with proofs thereof, in the shape of diplomas, certificates, etc., and shall accompany said application with satisfactory evidence of good character and reputation.

There shall be paid to the secretary-treasurer of the state board of chiropractic examiners, by each applicant for a license, a fee of fifty dollars (\$50.00), twenty-five dollars (\$25.00) of which shall accompany the application and the remainder, twenty-five (\$25.00) shall be paid upon the issuance of license. Like fees shall be paid for any subsequent examination and application.

History: En. initiative measure, Nov. 1918; effective under governor's proclamation, Dec. 28, 1918; amd. Sec. 1, Ch. 224, L. 1919; re-en. Sec. 3142, R. C. M. 1921; amd. Sec. 1, Ch. 129, L. 1933; amd. Sec. 1, Ch. 123, L. 1951; amd. Sec. 1, Ch. 178, L. 1955; amd. Sec. 1, Ch. 188, L. 1961.

Admission to Examination

The board of chiropractic examiners

were compelled to allow graduates of a certain chiropractic school to take examination required for license to practice where graduates of the school had previously been admitted to practice and where board refused to inspect school. State ex rel. Westercamp v. State Board of Chiropractic Examiners, 137 M 451, 352 P 2d 995, 999.

66-506. (3143) Examinations—subjects embraced in. Examinations for license to practice chiropractic shall be made by said board according to the method deemed by it to be the most practicable and expeditious to test the applicant's qualifications. Such application shall be designated by a number instead of the applicant's name, so that the identity will not be discovered or disclosed to the members of the board until after the examination papers are graded.

All examinations shall be made in writing, the subjects of which shall be as follows: Anatomy, physiology, symptomatology, diagnosis, chiropractic orthopedy, principles of chiropractic and adjusting, sanitation and hygiene, urinalysis, gynecology, and palpation. Additional subjects may be prescribed from time to time by the board to meet new conditions. A license shall be granted to all applicants who shall correctly answer seventy-five per centum of all questions asked, and if any applicant shall fail to answer correctly sixty per centum of the questions on any branch of said examination, he or she shall not be entitled to a license.

History: En. initiative measure, Nov. 1918; effective under governor's proclamation, Dec. 28, 1918; re-en. Sec. 3143, R. C. M. 1921.

Collateral References

Physicians and Surgeons 5.
70 C.J.S. Physicians and Surgeons § 12.

66-507. (3144) **Definition of chiropractic**. Chiropractic is the science that teaches that disease results from anatomic disrelation, and teaches the art of restoring anatomic relation by a process of adjusting by the use of the hand.

No other means of securing health shall be construed to be chiropractic except the application of the inherent qualities at the time in the patient or appertaining to the chiropractor.

History: En. initiative measure, Nov. 1918; effective under governor's proclamation, Dec. 28, 1918; re-en. Sec. 3144, R. C. M. 1921.

References

Bakewell v. Kahle, 125 M 89, 232 P 2d 127, 128.

66-508. (3145) Duties of chiropractic practitioners. Chiropractic practitioners shall observe and be subject to all state and municipal regulations relating to the control of contagious and infectious diseases, sign death and birth certificates, and as to any and all matters pertaining to public health, shall report to the proper health officers the same as other practitioners.

History: En. initiative measure, Nov. tion, Dec. 28, 1918; re-en. Sec. 3145, R. C. 1918; effective under governor's proclama- M. 1921.

66-509. (3146) Rights and limitations governing practice. Chiropractors licensed under this act shall have the right to practice that science defined as chiropractic under section 66-507, in accordance with the method, thought, and practice of chiropractors, and they shall be permitted to use the prefix Dr. or Doctor as a title, but shall not in any way imply that they are regular physicians or surgeons. They shall not prescribe for or administer to any person any medicine or drugs, nor practice medicine or surgery, nor osteopathy; except that the use of antiseptics for purposes of sanitation and hygiene, and to prevent infection and contagion, shall be permitted.

History: En. initiative measure, Nov. 1918; effective under governor's proclamation, Dec. 28, 1918; re-en. Sec. 3146, R. C. M. 1921.

Collateral References

Physicians and Surgeons 5.

70 C.J.S. Physicians and Surgeons §§ 3, 15.

Kind or character of treatment which may be given by one licensed as chiropractor. 86 ALR 630.

Liability of drugless practitioner or healer for malpractice. 19 ALR 2d 1188.

statement. The state board of chiropractic examiners may refuse to grant or revoke a license to practice chiropractic in this state, or may cause a licentiate's name to be removed from the records in the office of the recorder of deeds in this state upon any of the following grounds, to wit: The employment of fraud or deception in applying for a license or in passing an examination provided for in this act; the practice of chiropractic under a false or assumed name or the impersonation of another practitioner of like or different name; the conviction of a crime involving moral turpitude; habitual intemperance in the use of ardent spirits, narcotics or stimulants to such an extent as to incapacitate him or her for the performance of their professional duties. Any person who is a licentiate, or who is an applicant for a license to practice chiropractic, against whom any of the foregoing grounds for revoking or refusing a

license is presented to said board with a view of having the board revoke or refuse to grant a license, shall be furnished with copy of the complaint, and shall have a hearing before said board in person or by attorney, and witnesses may be examined by said board respecting the guilt or innocence of said accused.

Said board may at any time within two years of the refusal, revocation, or cancellation of registration under this section, by a majority vote, issue a new license or grant a license to the person affected, restoring him to or conferring upon him all the rights and privileges of, and pertaining to the practice of chiropractic as defined and regulated by this act. Any person to whom such rights and privileges have been restored shall pay to the secretary-treasurer the sum of fifty dollars (\$50.00) upon issuance of a new license.

History: En. initiative measure, Nov. 1918; effective under governor's proclamation, Dec. 28, 1918; re-en. Sec. 3147, R. C. M. 1921; amd. Sec. 2, Ch. 188, L. 1961.

Collateral References

Physicians and Surgeons € 11. 70 C.J.S. Physicians and Surgeons § 16.

66-511. (3148) Recordation of license—failure or refusal to record. Every person who shall receive a license from the state board of chiropractic examiners shall have it recorded in the office of the recorder of deeds of the county of which he resides, and shall likewise have it recorded in the counties to which he shall subsequently remove for the purpose of practicing chiropractic.

The failure or refusal on the part of the holder of a license to have it recorded before he or she shall be in the practice of chiropractic in this state, after having been notified by the state board of chiropractic examiners to do so, shall be sufficient grounds to revoke or cancel a license and render it null and void. The recorder shall keep for public inspection, in a book provided for that purpose, a complete list and description of the licenses recorded by him. When any such licenses shall be presented to him for record, he shall stamp upon the face thereof his signed memorandum of the date when such license was presented for record.

History: En. initiative measure, Nov. 1918; effective under governor's proclamation, Dec. 28, 1918; re-en. Sec. 3148, R. C. M. 1921.

Collateral References

Physicians and Surgeons 5.
70 C.J.S. Physicians and Surgeons § 23.

66-512. (3149) Renewal. One of the purposes of this act is to require each licensee to keep abreast of and informed about the developments and advances in the science of chiropractic, and, therefore, each license shall expire on the first day of September in each year, and shall be renewed then or thereafter, by the board, upon payment of a renewal fee of not less than five dollars (\$5.00) nor more than fifteen dollars (\$15.00) as set by the state board of chiropractic examiners, and the presentation of evidence satisfactory to said board that the licensee, in the year preceding the application for renewal, attended at least one of the two-day educational programs as conducted by the Montana chiropractic association; provided, that the board may grant renewals, but not consecutive renewals, upon a showing satisfactory to said board that attendance upon said

educational programs was unavoidably prevented, provided that new licensees during the six (6) months preceding said September first, by examination, shall be granted renewal licenses without attending said educational programs, provided, that a failure to renew a license shall not prevent a licensee from subsequently applying for and receiving a license, as if there were no lapse of time between the expiration of the old license, and the granting of a renewal license; provided, that nothing herein shall prevent a renewal of said license if in said preceding year for any reason, at least one of the said educational programs is not conducted in the state of Montana.

History: En. initiative measure, Nov. 1918; effective under governor's proclamation, Dec. 28, 1918; amd. Sec. 1, Ch. 90, L. 1921; re-en. Sec. 3149, R. C. M. 1921; and. Sec. 2, Ch. 129, L. 1933; amd. Sec. 2, Ch. 123, L. 1951; amd. Sec. 3, Ch. 188, L. 1961.

Collateral References

Physicians and Surgeons 5.
70 C.J.S. Physicians and Surgeons § 20.

66-513. (3150) Disposition of fees—receipts and disbursements—per diem and mileage. All examinations and renewal fees received by the state board of chiropractic examiners under this act shall be paid to the secretary-treasurer of said board, who shall at the end of each month deposit the same with the state treasurer, and the said state treasurer shall place said money so received in a special fund of the state board of chiropractic examiners and shall pay the same out in warrants drawn by the auditor of the state thereof, upon vouchers issued and signed by the president and the secretary-treasurer of said board. Said money so received and placed in said fund may be used by the state board of chiropractic examiners in defraying their expenses in carrying out the provisions of this act.

The secretary-treasurer shall keep a true and accurate account of all funds received and all vouchers issued by the board; and on the first day of December of each year he shall file with the governor of the state a report of all receipts and disbursements and the proceedings of said board for the fiscal year.

The members of said board shall receive a per diem of twenty-five dollars for each day during which they shall be actually engaged in the discharge of their duties, and mileage at the rate of ten cents per mile for each mile necessarily traveled in going to and from any meeting of said board.

Such per diem and mileage and such other incidental expenses necessarily connected with said board shall be paid out of the fund of the state board of chiropractic examiners, and not otherwise.

History: En. initiative measure, Nov. tion, Dec. 28, 1918; re-en. Sec. 3150, R. C. 1918; effective under governor's proclama- M. 1921; amd. Sec. 4, Ch. 188, L. 1961.

66-514. (3151) Bond of treasurer—dismissal of members of board. The treasurer of said board shall give bond in such sum and with such sureties as the board may deem proper. Upon sufficient proof to the governor of the inability or misconduct of a member of the board, said member shall be dismissed, and the governor shall appoint as his successor some licensed

chiropractor practicing in this state, who shall be a graduate of a different school than those represented on the board.

History: En. initiative measure, Nov. tion, Dec. 28, 1918; re-en. Sec. 3151, R. C. 1918; effective under governor's proclama- M. 1921.

66-515. (3152) Admission to practice of persons from other states. Persons licensed to practice chiropractic under the laws of any other state having chiropractic educational requirements equal to this act, may, in the discretion of the board, be issued a license to practice in this state without examination, upon payment of the fee of fifty dollars (\$50.00) as herein provided.

History: En. initiative measure, Nov. 1918; effective under governor's proclamation, Dec. 28, 1918; re-en. Sec. 3152, R. C. M. 1921; amd. Sec. 5, Ch. 188, L. 1961.

Collateral References

Physicians and Surgeons 5.

70 C.J.S. Physicians and Surgeons §§ 8,

12.

66-516. (3153) Penalty for violation of act. Any person who shall practice, or attempt to practice chiropractic, or any person who shall buy, sell, or fraudulently obtain any diplomas, or license to practice chiropractic whether recorded or not, or who shall use the title chiropractor, D. C. Ph. C., or any word title to influence belief that he is engaged in the practice of chiropractic, without first complying with the provisions of this act, or any person who shall violate any of the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars (\$100.00) nor more than seven hundred dollars (\$700.00) or by imprisonment in a county jail for not less than thirty (30) days or more than seven (7) months, or by both such fine and imprisonment. Prosecutions for the violation of this act shall be instituted in the district courts.

History: En. initiative measure, Nov. tion, Dec. 28, 1918; re-en. Sec. 3153, R. C. 1918; effective under governor's proclamaM. 1921; amd. Sec. 1, Ch. 74, L. 1943.

66-517. (3154) Limitations upon construction of act. Nothing in this act contained shall be construed to restrain or restrict any legally licensed physician or surgeon or any legally licensed osteopath in the practice of his profession. The practice of chiropractic as herein defined, is hereby declared not to be the practice of medicine or surgery within the meaning of the laws of the state of Montana defining the same, and is further declared not to be the practice of osteopathy within the meaning of the laws of the state of Montana defining the same. Duly licensed chiropractors shall not be subject to the provisions of sections 66-1401 to 66-1413 nor liable to any prosecution thereunder.

History: En. initiative measure, Nov. tion, Dec. 28, 1918; re-en. Sec. 3154, R. C. 1918; effective under governor's proclama- M. 1921.

CHAPTER 6

CHIROPODY—REGULATION OF PRACTICE

Section 66-601. Definitions.

66-602. License—amputations not allowed.

66-603. Chiropody examiners—examinations—qualifications—schools—fees—nonresident practitioners.

66-604. Examination—fees.

66-605. Designation of licensees—renewals—reissuance of license—display of license required-recording necessary.

66-606. Refusal or revocation of license.

66-607. Disposal of moneys collected.

Compensation of examiners expenses. 66-608.

66-609. Penalty for violations of act.

Application of act. 66-610. 66-611. Construction of act.

(3154.1) **Definitions.** Chiropody (sometimes called podiatry) shall, for the purpose of this act, mean the diagnosis, medical, surgical. mechanical, manipulative and electrical treatment of ailments of the human foot. A chiropodist shall mean one practicing chiropody.

History: En. Sec. 1, Ch. 2, L. 1923; amd. Sec. 1, Ch. 218, L. 1939.

41 Am. Jur. 159, Physicians and Surgeons, § 29.

Collateral References

Physicians and Surgeons 2. 70 C.J.S. Physicians and Surgeons § 2.

Regulation of chiropody. 33 ALR 841. Construction of restrictive medical or surgical license as regards kinds or character of treatment. 86 ALR 623.

66-602. (3154.2) License—amputations not allowed. It shall be unlawful for any person to profess to be a chiropodist, to practice or assume the duties incident to chiropody, or to advertise in any form or hold himself out to the public as a chiropodist or podiatrist, or in any sign or advertisement to use the word chiropodist or podiatrist, foot correctionist, or any other term or terms, letters indicating to the public that they are holding themselves out as a chiropodist, or foot correctionist in any manner as defined in this act, without first obtaining from the state board of chiropody medical examiners a license authorizing the practice of chiropody in this state, except as hereinafter provided. No chiropodist shall amputate the human foot or toe or toes, or administer any anesthetic other than local.

History: En. Sec. 2. Ch. 2. L. 1923; amd. Sec. 2, Ch. 218, L. 1939.

70 C.J.S. Physicians and Surgeons § 23.

Collateral References

Liability of chiropodist for malpractice. 80 ALR 2d 1278.

Physicians and Surgeons \$\sim 5(1).

66-603. (3154.3) Chiropody examiners—examinations—qualifications schools—fees—nonresident practitioners. (1) There is hereby created a state board of chiropody medical examiners consisting of one physician to be selected at its annual meeting by the state board of medical examiners from its membership, the secretary of the state board of medical examiners, and two chiropodists to be selected and to serve as hereinafter provided. The Montana Association of Chiropodists shall select six chiropodists from its membership, who shall be residents of and shall have engaged in the active practice of chiropody for at least two years in this state, and shall be of high integrity and ability. Within thirty days from and after the selection of said six chiropodists as aforesaid, the governor of Montana shall appoint three of their number and so designate the term of office of each, that the term of office of one member shall expire in one (1) year, one in two (2) years, and one in three (3) years, from date of appointment; annually thereafter, the governor shall appoint one member who shall be a licensed chiropodist possessing the qualifications hereinbefore mentioned who shall serve for a period of three (3) years or until his successor shall have been appointed by the governor. Should any vacancy arise on afore-said board before the expiration of the term of office of any of the chiropodist members of said board, such vacancy shall be filled by appointment by the governor within thirty days, such appointee to possess the qualifications heretofore stated, and to be selected from those remaining of the said six chiropodists theretofore selected by the Montana Association of Chiropodists unless said number of selected chiropodists shall have been exhausted.

(2) Examinations shall be held semiannually at such places and time as the state board of chiropody medical examiners shall direct. On and after the date of the taking effect of this act, all persons who may wish to begin practice of chiropody in this state, shall make application upon a blank form authorized and furnished by said state board of medical examiners, for a license to practice chiropody. This application shall be granted to such applicants, after they shall have furnished satisfactory proof of being at least twenty-one (21) years of age, of good moral character, of having attained high school graduation or its equivalent and of having had at least two years of instruction in an accredited school of chiropody recognized as being in good standing by the Montana board of chiropody medical examiners, but after June 1st, 1941, no school of chiropody shall be accredited by said board which does not require for graduation four years of instruction in the study of chiropody. All chiropodists, actively engaged in the practice of chiropody one or more years and licensed by the state board of medical examiners, prior to April 1st, 1939, whether meeting these requirements or not, shall, upon furnishing proof thereof to said board of chiropody medical examiners be entitled to a license without examination. A license without written examination may be issued to chiropodists of other states maintaining equal statutory requirements for the practice of chiropody and extending the same reciprocal privilege to this state provided further that they have had a valid license for at least two years in that state prior to filing for reciprocal privilege, and by payment of fifty dollars (\$50.00) to the board of medical examiners fund.

History: En. Sec. 3, Ch. 2, L. 1923; amd. Sec. 3, Ch. 218, L. 1939.

NOTE.—See note to Sec. 66-607.

Collateral References

Physicians and Surgeons 3, 4, 5(2). 70 C.J.S. Physicians and Surgeons §§ 11, 23.

66-604. (3154.4) Examination—fees. From and after the passage and approval of this act, any person not exempt from examination under section 66-603 and desiring a license to practice chiropody shall be examined in the following subjects: Anatomy, chemistry, dermatology, diagnosis, materia medica, pathology, physiology, therapeutics, clinical and orthopedic chiropody, histology, bacteriology, pharmacy, neurology, surgery (minor), chiropody, foot orthopedica, shoe therapy, physiotherapy, roentgenology, hygiene, and sanitation, ethics and culture, limited in their scope to the treatment of the human foot, and, if qualified, shall receive a license. The minimum requirements for a license shall be a general average of seventy-five per cent (75%) in all the subjects involved, and not less than fifty per cent (50%) in any one subject. An examination and license fee of thirty-five dollars (\$35.00) shall be paid to the secretary of the state board

of medical examiners. Any applicant failing in the examination and being refused a license shall be entitled within six months of such refusal to a re-examination, but one such re-examination shall exhaust his privilege under the original examination.

History: En. Sec. 4, Ch. 2, L. 1923; amd. Sec. 4, Ch. 218, L. 1939.

Collateral References
Physicians and Surgeons \$\infty\$5(2).
70 C.J.S. Physicians and Surgeons \$ 4.

66-605. (3154.5) Designation of licensees — renewals — reissuance of license—display of license required—recording necessary. Every license issued hereunder shall be designated as "registered chiropodist's license" and shall not contain any abbreviations thereof, nor any other designation nor title except that a statement of limitation shall be contained in said license referring to the licensee as "registered chiropodist—practice limited to the foot," so as not to mislead the public in regard to their right to treat other portions of the body. All licenses shall be recorded by the secretary of the state board of medical examiners in the manner of other medical licenses; the person receiving such license shall have it recorded in the office of the county clerk in the county in which he or she resides, and the record shall be endorsed thereon. In case the person so licensed shall remove to another county to practice, the holder shall record the license in a like manner in the county into which he or she removed, and the county clerk is entitled to charge and receive the usual fee for making such record. A renewal license fee of three dollars (\$3.00) shall be paid annually on July 1st of each year, and if not paid within three months thereafter, the license shall be revoked and shall be reissued only upon original application and payment of a fee of thirty-five dollars (\$35.00). All licenses shall be conspicuously displayed by said chiropodists at their offices or other places of practice.

History: En. Sec. 5, Ch. 2, L. 1923; amd. Sec. 5, Ch. 218, L. 1939.

66-606. (3154.6) Refusal or revocation of license. The state board of chiropody medical examiners may, after due hearing, refuse to grant, revoke or renew any license provided for in this act to a person, otherwise qualified, who obtained said license by fraudulent representation, for incompetency in practice, for use of untruthful or improbable statements to patients or in his advertisements, for habitual intoxication or for unprofessional and immoral conduct, or for selling or giving away alcohol or drugs for any illegal purpose, but said board may reissue a license after a lapse of six months, if in its judgment such act or acts, conditions and/or conditions of disqualification shall have been remedied.

History: En. Sec. 6, Ch. 2, L. 1923; amd. Sec. 6, Ch. 218, L. 1939.

Collateral References
Physicians and Surgeons € 11.
70 C.J.S. Physicians and Surgeons § 16.

66-607. (3154.7) Disposal of moneys collected. All fees and licenses shall be paid to and collected by the secretary of the state board of medical examiners, who shall at least quarterly each year pay the same to the state treasurer, and the state treasurer shall receive and accept such moneys and credit same to a special fund to be known and designated as board

of medical examiners fund and such fund shall not be used or expended for any purpose other than as provided for in section 66-1009.

History: En. Sec. 7, Ch. 2, L. 1923.

NOTE,-Name of the fund mentioned in the foregoing section has been changed to conform to later enactment (Sec. 5, Ch. 132, Laws 1943; Sec. 66-1009 of this code). Collateral References

Physicians and Surgeons 5. 70 C.J.S. Physicians and Surgeons §§ 11, 20.

66-608. (3154.8) Compensation of examiners—expenses. Each member of the board of examiners, except the secretary and the physician members who are otherwise paid for the performance of their duties as medical examiners, shall receive for his services out of the funds created by the payment of fees by applicants for licenses, the sum of five dollars (\$5.00) per diem and necessary traveling and incidental expenses, while the secretary shall receive his necessary expenses for services which cannot be performed at the capital. All printing, postage and other contingent expenses, necessarily incurred, shall be paid from said funds, and all expenses shall be itemized, verified, audited, upon presentation by the state board of medical examiners, and a warrant drawn therefor by the state auditor on the board of medical examiners fund in the same manner as other expenses of the state board of medical examiners.

History: En. Sec. 8, Ch. 2, L. 1923. NOTE.—See note to Sec. 66-607.

Collateral References

Physicians and Surgeons 3. 70 C.J.S. Physicians and Surgeons § 13.

66-609. (3154.9) Penalty for violations of act. Any person who shall knowingly violate any of the provisions of this act and upon conviction thereof shall be fined the sum not exceeding one thousand dollars (\$1,000.00) or be imprisoned in the county jail not to exceed two years, or both.

History: En. Sec. 9, Ch. 2, L. 1923.

Collateral References

Physicians and Surgeons 3 et seg. 70 C.J.S. Physicians and Surgeons § 3.

(3154.10) Application of act. This act shall not apply to any physician licensed to practice his profession in this state, nor to surgeons of the United States army, navy and/or United States public health service. when in actual performance of their duties.

History: En. Sec. 10, Ch. 2, L. 1923; amd. Sec. 7, Ch. 218, L. 1939.

66-611. Construction of act. Nothing in this act shall be construed as prohibiting the fitting, recommending, advertising, adjusting or the sale of corrective shoes, arch support, or similar mechanical appliances or foot remedies by retail dealers or manufacturers.

History: En. Sec. 8, Ch. 218, L. 1939.

CHAPTER 7

COMMISSION MERCHANTS—REGULATION

Section 66-701. Commission merchants to acknowledge receipt of property. 66-702. Statement to consignor on sale of property. 66-703. Penalties for violation of act.

66-701. (4183) Commission merchants to acknowledge receipt of property. Any person or persons doing business in this state as commission merchants, or who shall receive from any person of this state, agricultural or horticultural products or farm produce raised in this state to sell on commission, shall immediately, upon receipt of such goods, send to the consignor or consignors a statement in writing showing what property has been received.

History: En. Sec. 1, Ch. 2, L. 1909; re-en. Sec. 4183, R. C. M. 1921.

Collateral References Factors \$25. 35 C.J.S. Factors \$25.

66-702. (4184) Statement to consignor on sale of property. Whenever any commission merchant or person receiving any property as mentioned in the preceding section, shall sell the same or twenty-five per centum thereof, such commission merchant or person shall immediately render a true statement to the consignor, showing what portion of such consignment has been sold, to whom sold and the price received therefor.

History: En. Sec. 2, Ch. 2, L. 1909; re-en. Sec. 4184, R. C. M. 1921.

66-703. (4185) Penalties for violation of act. Any person engaged in selling any property as herein specified, who fails or neglects to comply with any of the provisions of this act, or who shall make a false report or statement of the matters herein required, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

History: En. Sec. 3, Ch. 2, L. 1909; re-en. Sec. 4185, R. C. M. 1921.

CHAPTER 8

COSMETOLOGY (BEAUTY SHOPS) REGULATION

- Section 66-801. License required to practice or teach cosmetology or operate a beauty shop, cosmetological establishment or school, and provisions for registration of schools of cosmetology.
 - 66-802. Definitions.
 - 66-803. Requirements for practicing or teaching cosmetology or operating a school of cosmetology.
 - 66-804. Creation of state examining board of cosmetology—term—appointment—qualifications.
 - 66-805. Meeting—officers to be selected.
 - 66-806. Power of board to promulgate rules and regulations and to approve price agreements.
 - 66-807. Registration—licenses.
 - 66-808. Examinations.
 - 66-809. Compensation of members of board.
 - 66-810. Bond of secretary-treasurer.
 - 66-811. Powers and duties of the board to refuse, revoke, or suspend licenses and the procedure therefor.
 - 66-812. Sanitary rules.
 - 66-813. Inspector of beauty parlors-salary and expense.
 - 66-814. Appeal from actions of the board.
 - 66-815. Fees.
 - 66-816. Duration and renewal of licenses and certificates—delinquent renewal fee.
 - 66-817. Prohibited acts-penalties-injunctive relief.
 - 66-818. To whom provisions in this act shall not apply.

66-801. (3228.1) License required to practice or teach cosmetology or operate a beauty shop, cosmetological establishment or school, and provisions for registration of schools of cosmetology. No person shall practice or teach cosmetology without a license and no place shall be used or maintained for the teaching of cosmetology for compensation, except under a certificate of registration, and no person shall operate, manage or conduct a beauty shop or school and teach the art therein, or practice therein, without a manager-operator license. No manager-operator license shall be issued after December 31, 1961, unless the applicant therefor shall have been actively engaged in or teaching the practice of cosmetology in this state for a period of one (1) year preceding such application in addition to possessing the other requirements provided for a practitioner or teacher of cosmetology. Any person, firm, copartnership or corporation desiring to operate a cosmetological establishment shall make an application to the board for certificate of registration and license. The application shall be accompanied by the annual registration fee.

History: En. Sec. 1, Ch. 104, L. 1929; amd. Sec. 1, Ch. 222, L. 1939; amd. Sec. 1, Ch. 80, L. 1941; amd. Sec. 1, Ch. 211, L. 1945; amd. Sec. 1, Ch. 20, L. 1955; amd. Sec. 1, Ch. 244, L. 1961.

Collateral References Licenses \$\infty\$11(1).

53 C.J.S. Licenses § 30. 7 Am. Jur. 613, Barbers and Beauty Specialists, generally.

Constitutionality, validity, construction and effect of statute or ordinance regulating beauty shop or specialists. 56 ALR 2d 879.

66-802. (3228.2) **Definitions.** The practice and teaching of cosmetology is defined to be and includes any or all work generally and usually included in the term "hairdressing" and "beauty culture" and performed in so-called hairdressing and beauty shops, or by itinerant cosmetologists, which work is done for the embellishment, cleanliness and beautification of the hair, scalp, face, arms or hands. Provided, however, that itinerant cosmetologists shall not be construed to include itinerant cosmetologists who perform their services without compensation for demonstration purposes, in any regularly established store or place of business, holding a license from the state of Montana as such store or place of business. Nor shall it be construed to include cosmetological artists who demonstrate cosmetological skills under the auspices of the state association of cosmetology or its affiliated units, whether at meetings or in licensed cosmetological establishments.

A cosmetological establishment is any premises, building or part of building whereon or wherein is practiced any branch or combination of branches of cosmetology, or the occupation of a hairdresser and cosmetician or cosmetologist.

A cosmetological establishment shall at all times be in charge of a manager-operator.

History: En. Sec. 2, Ch. 104, L. 1929; amd. Sec. 2, Ch. 222, L. 1939; amd. Sec. 2, Ch. 20, L. 1955; amd. Sec. 2, Ch. 244, L. 1961.

Collateral References Licenses© 8(1). 53 C.J.S. Licenses § 13.

66-803. (3228.3) Requirements for practicing or teaching cosmetology or operating a school of cosmetology. Before anyone may practice or teach

cosmetology, or any person, firm, or copartnership, or corporation may operate a school of cosmetology, such person, firm, or copartnership or corporation must obtain a license or certificate of registration from the state board as hereinafter provided. To be eligible to take the examination to practice cosmetology the applicant must not be less than eighteen (18) years of age and a graduate of the eighth grade school and must be of good moral character. Such applicant must have completed a continuous course of study of at least two thousand (2,000) hours in a registered beauty school, which course of study has been distributed over a period of not less than ten (10) months or more than twelve (12) months, and has received a diploma from said beauty school, or must have completed the course of study in cosmetology prescribed by the state board of education, ex officio regents of the university of Montana, for northern Montana college. Such person so qualified must file with the secretary of the state board, a written application to take such examination accompanied by a health certificate issued by a registered, licensed physician on a form supplied by the state board, and shall deposit with the secretary of the said board, the required examination fee and pass an examination as to his or her fitness to practice cosmetology. Before an applicant may take an examination to obtain a license as a teacher of cosmetology, he or she must have a diploma from a registered beauty school, and must also have a license to practice cosmetology, and must show that he or she has been actively engaged as a beauty operator for three (3) continuous years prior to taking said teachers' examination. Said applicant must qualify by filing an application as prescribed by the board and by taking and passing such examination as prescribed and given by the state board before a license shall issue. Such license must be renewed annually as herein provided.

Provided, further, the board may grant to graduates of registered schools of this state upon the payment of a fee of two dollars (\$2.00) a temporary license authorizing such graduates to practice as an operator under the supervision of a licensed cosmetologist, in the practice of hairdressing and beauty culture, for a period of not to exceed ninety (90) days, or until the next examination is held by the board. No such temporary license shall be issued except upon the presentation by the applicant of a certificate of graduation from a registered school of the state of Montana, and such temporary licenses shall not be renewable.

No person, firm or copartnership, or corporation shall operate a school for the purpose of teaching cosmetology for compensation unless a certificate of registration has been first obtained from the state board. Application for such certificate shall be filed with such board on such form as the board shall prescribe.

No school for teaching cosmetology shall be granted a certificate of registration unless it complies, or can comply, with the following requirements:

(1) Have in its employ a licensed teacher who shall be, at all times, in the immediate supervision of the work of said school, or such other teachers as the state board may determine is necessary for the proper

conduct of said school. Provided, however, that there shall not be more than twenty-five (25) students to each such teacher.

- (2) It shall possess such apparatus and equipment as the state board may determine is necessary for the ready and full teaching of all subjects or practices of cosmetology.
- (3) It shall maintain a school term of not less than two thousand (2,000) hours extending over a period of ten (10) consecutive months, and shall prescribe a course of practical training and technical instructions equal to the requirements for state board examinations, which course of training and technical instruction shall be prescribed by the state board.
- (4) It shall keep a daily record of the attendance of each student, establish grades, and hold examinations before issuing diplomas.
- (5) No owner, or person in charge of a school of cosmetology shall permit any person to sleep in or use for residential purposes, or any other purpose which would tend to make the room unsanitary, any room used, wholly or in part for a school of cosmetology.
- (6) Certificates of registration may be refused, revoked, or suspended, as provided in section 66-811.
- (7) The state board shall have the power to prescribe such further rules and regulations as they deem necessary for the proper conduct of schools of cosmetology.
- (8) The state board shall require of the person, firm, copartnership, or corporation operating a school to furnish a good and sufficient bond in the amount of \$5,000 and in a form and manner to be prescribed by the board.
- (9) No professional beauty shop shall be operated in connection with any school of cosmetology.

If a licensee shall contract a communicable disease, endangering the public health, the board shall, upon proof of same, cancel or suspend his or her license until such time as said licensee can secure a physician's certificate showing that such licensee is free from a communicable disease.

History: En. Sec. 3, Ch. 104, L. 1929; amd. Sec. 1, Ch. 14, L. 1931; amd. Sec. 3, Ch. 222, L. 1939; amd. Sec. 1, Ch. 210, L. 1945; amd. Sec. 3, Ch. 244, L. 1961.

Collateral References
Licenses \$\infty 20.
53 C.J.S. Licenses \$ 35.

66-804. (3228.4) Creation of state examining board of cosmetology—term—appointment—qualifications. There is hereby created a state examining board which shall be called and styled "the Montana state examining board of cosmetology," consisting of three members, each of whom shall be a cosmetologist, to be appointed by the governor, from a list of six persons recommended by the Montana state hairdressers' association. Each member hereinafter appointed shall serve four (4) years and until his or her successor is appointed. The members hereinafter appointed on said board must have been actively engaged in the profession of cosmetology for at least five (5) years prior to such appointment, and must have been a resident of the state of Montana for at least five (5) years immediately prior to such appointment. The board members shall be at

least twenty-five (25) years old and graduates of a high school or its equivalent. No two members of the said board shall be members of or affiliated with any school of cosmetology. The board hereby created shall be referred to hereinafter as the "state board." Said board shall adopt a seal to authenticate its acts.

History: En. Sec. 4, Ch. 104, L. 1929; amd. Sec. 4, Ch. 222, L. 1939; amd. Sec. 4, Ch. 244, L. 1961.

Collateral References
Licenses©21.
53 C.J.S. Licenses 8 37.

66-805. (3228.5) **Meeting—officers to be selected.** The state board shall annually, on or before the first of March of each year, elect from their number a president, vice-president, and secretary-treasurer.

History: En. Sec. 5, Ch. 104, L. 1929; amd. Sec. 5, Ch. 222, L. 1939.

66-806. (3228.6) Power of board to promulgate rules and regulations and to approve price agreements. (1) The Montana state examining board of beauty culturists [cosmetology] shall have power to approve price agreements among licensed practitioners and students in beauty schools, under this act, whereby minimum prices for hairdressing and beauty culture are established by explicit written agreement signed and executed by at least seventy-five (75) per cent of the practitioners in any county within the state of Montana, and submitted to the board by such signing group over the signatures of all thereof; providing also that beauty schools shall charge for students' work, not less than fifty (50) per cent of the established minimum prices, as determined and approved by seventy-five (75) per cent of the practitioners in that particular area. Upon receipt of such price agreements, so executed, the board shall proceed to investigate the reasons therefor and the necessity of justification for such agreement, and in the event that the board, in its discretion, concludes that such price agreement is just and under the conditions obtaining for the particular territory involved, will best protect the public health and safety by affording a sufficient minimum price for hairdressing and beauty culture to enable the practitioners to furnish modern and healthful services, and appliances to minimize danger to the public health, the board may approve such agreements for the term proposed therefor or for such shorter term as the board may deem proper.

(2) The board shall also have power to consider separately, the petition of an incorporated town or city, when accompanied by the signatures of at least two-thirds (2/3) of the licensed practitioners in such town or city and the board may approve, if deemed necessary, according to the purpose of this act, any changes in existing price agreements or establish new agreements, when approved by seventy-five (75) per cent of the licensed practitioners within such town or city. All other communities and territory adjacent to any town or city and all other areas in the county shall abide by the rules and agreements heretofore prescribed for that particular county.

For the purposes above, a city or town shall be deemed to include, in addition to the territory lying within its legal boundaries, the territory adjacent to it and lying within three miles of said legal boundaries, in any direction.

- (3) In determining whether any such price agreement is necessary and just, and will protect the public health and safety, the board shall give consideration to all conditions affecting hairdressing and the beauty culture art, as practiced, in its relation to public health and safety, and also to the necessary costs incurred in the particular territorial area in maintaining shops or parlors in sanitary and attractive condition. The board shall, on its own initiative, investigate or cause to be investigated conditions existing in the practice of cosmetology throughout the state, and shall establish new or modify existing minimum prices wherever and whenever it shall appear in the discretion of the board that such action shall be in the best interests of public health and safety and in keeping with the purposes and objectives of this act. In no event shall any minimum price agreement or standard be established, approved, modified or abolished, except after public hearing thereon, notice of said hearing and the purpose, time and place thereof to be mailed by the board to every licensed practitioner in the area affected thereby as the same shall appear from the records of the board and shall be published at least once in a newspaper of general circulation which the board shall deem most likely to give notice to the public, such mailing and publication to be done not less than ten (10) days prior to the hearing.
- The price agreement as proposed, or as modified by the board, shall be put into effect by official order of the board, which shall plainly state the minimum price for all work usually performed in a beauty shop or parlor within the county, city or town in which the price agreement has been signed, and for which it is effective, and thereafter no person subject to this act shall advertise or sell any service for less than the minimum price thereof within the area for which said price was established. If the board, at the time of the receipt of the proposal, or at any time thereafter, including any time subsequent to its order, either upon petition of two-thirds (2/3) of the signatories to said price agreement, or upon the board's initial motion finds that the minimum prices so fixed by its order are insufficient or improperly adjusted, to provide healthful services to the public and keep the shops and parlors in a safe, sanitary and attractive condition, then the board shall have authority to modify said minimum prices by prescribing such increases, adjustments or decreases, if necessary, best calculated to realize said objectives.
- (5) The state board shall prescribe reasonable rules for the conduct of its business and for the qualification, examination and registration of applicants to practice or teach cosmetology, and for applicants for manager-operator licenses, and for the regulation and instruction of apprentices and students, and for the conduct of schools of cosmetology for apprentices and students, and generally for the conduct of the persons, firms or corporations affected by this act, within the limits of the act.

History: En. Sec. 6, Ch. 104, L. 1929; amd. Sec. 2, Ch. 80, L. 1941; amd. Sec. 5, Ch. 244, L. 1961.

Compiler's Note

The compiler has inserted the bracketed word "cosmetology" in subd. (1).

66-807. (3228.7) Registration—licenses. If the board finds that an applicant for examination, or for certificate of registration, has complied with the requirements of this act and has paid the required fee, the board shall

admit such applicant to examination and shall issue a license or certificate of registration to those who have successfully passed such examination or are entitled to such certificate of registration in accordance with the provisions of this act.

History: En. Sec. 7, Ch. 104, L. 1929; amd. Sec. 6, Ch. 222, L. 1939.

53 C.J.S. Licenses § 39.
7 Am. Jur. 616, Barbers and Beauty Specialists, § 7.

Collateral References Licenses \$\infty 22.

66-808. (3228.8) Examinations. Examinations for operator's license shall be held at least two times a year and not more than five times a year and for teacher's license once each year, at a place and time specified by said board. Such examinations shall be conducted by said state board or by examiners appointed by a majority of said board for such purpose. Such examiners shall have had at least three years practical experience and shall be licensed cosmetologists and shall not be connected with any school of cosmetology in the state of Montana. The examinations shall not be confined to any specific method or system.

Provided that physically handicapped persons trained for cosmetology under the state bureau of vocational rehabilitation shall, for a period of one year immediately following their graduation, be exempted from this examination and the fees described in section 66-815. Upon certification from the state supervisor of rehabilitation that a bureau beneficiary has successfully completed the required apprenticeship or training in a shop or beauty school, the secretary of the state board shall issue such person the necessary certificate or license to practice the profession in Montana.

History: En. Sec. 8, Ch. 104, L. 1929; amd. Sec. 1, Ch. 85, L. 1935; amd. Sec. 7, Ch. 222, L. 1939.

(3228.9) Compensation of members of board. Each member of the board shall receive, as compensation for his or her services, the sum of ten dollars (\$10.00) for each day's actual attendance at board meetings, not to exceed three consecutive days, and each member shall be reimbursed for his or her expenses necessarily incurred in the performance of his or her duties hereunder. All such compensation and necessary expenses shall be paid by the board out of the funds received by it and no part shall be paid by the state. The secretary of the state board shall receive an annual salary to be fixed by the board, and his or her necessary expenses actually incurred in the performance of official duties. Such secretary shall not receive, in addition to the salary herein provided, the per diem herein provided for attendance of board meetings. The state board may make reasonable provisions, for its expenses in the enforcement of this act, and for compensation and expenses of examiners; provided, however, that no payments shall be made by the board except upon a verified claim filed with the board and approved by the majority thereof, and by warrants signed by the president and secretary-treasurer of the board.

History: En. Sec. 9, Ch. 104, L. 1929; amd. Sec. 8, Ch. 222, L. 1939.

66-810. (3228.10) Bond of secretary-treasurer. The secretary-treasurer of said state board shall give a corporate surety bond payable to the board, in the sum of five thousand dollars (\$5,000.00) approved by the said board, conditioned as the board may specify for the faithful performance of the duties of this office. Such bond shall have the oath of office endorsed thereon and shall be deposited with the president of the board, and kept in his or her office.

History: En. Sec. 10, Ch. 104, L. 1929; amd. Sec. 9, Ch. 222, L. 1939.

Collateral References Licenses 21. 53 C.J.S. Licenses § 38.

66-811. (3228.11) Powers and duties of the board to refuse, revoke, or suspend licenses and the procedure therefor. The board shall have the power to refuse, refuse to renew, revoke, or suspend licenses as follows:

The board shall not issue, or having issued, shall not renew, or may revoke, or suspend, at any time any license as required by the provisions of this act, in any one of the following cases: (a) failure of a person, firm, copartnership or corporation operating a cosmetological establishment or school of cosmetology to comply with the requirements of this act; (b) failure to comply with the sanitary rules, adopted by the board and approved by the state board of health, for the regulation of cosmetological establishments or schools of cosmetology; (c) gross malpractice; (d) continued practice by a person knowingly having an infectious or contagious disease; (e) habitual drunkenness, or habitual addiction to the use of morphine or any habit-forming drugs; (f) permitting a certificate of registration or license to be used where the holder thereof is not personally, actively, and continuously engaged in business; (g) failure to display the license; provided, however, that the said board shall not refuse to issue or renew any license as required by the provisions of this act, or revoke or suspend any such license already issued, except upon ten (10) days' notice in writing to the interested parties, which notice shall contain a brief statement of the reasons for the contemplated action of the board and designate a proper time and place for the hearing of all interested parties before any final action is taken as hereinafter provided; provided, however, that due notice within the provisions of this section shall be deemed to have been given when the board shall have placed in a United States post office a copy of the notice as hereinabove provided, addressed to the designated or last known residence of the person applying for such license or to whom such license has already been issued; provided, further, that any person, firm, copartnership or corporation whose license to do business as herein provided is revoked or suspended or who is refused a license or a renewal of a license already issued may commence an action in a court of competent jurisdiction against the state board of cosmetology for the purpose of canceling or obtaining other relief from the act of the said board. All provisions of the Code of Civil Procedure relating to pleadings, proofs, trials and appeals shall be applicable to such action.

History: En. Sec. 11, Ch. 104, L. 1929; amd. Sec. 10, Ch. 222, L. 1939.

Collateral References Licenses©=38, 53 C.J.S. Licenses § 44. 66-812. (3228.12) Sanitary rules. The said board, subject to the approval of the state board of health, shall prescribe such sanitary rules as it may deem necessary, with particular reference to the precautions necessary to be employed to prevent the creating and spread of infectious and contagious diseases.

History: En. Sec. 12, Ch. 104, L. 1929.

66-813. (3228.13) Inspector of beauty parlors—salary and expense. The state board of health, with the approval of the state board, shall appoint and may remove one or more inspectors who are licensed to practice under this act, each of whom shall devote his or her time to inspecting beauty parlors and performing such other duties connected therewith as the state board may direct. Such inspectors may enter any beauty parlor or school of cosmetology during business hours for the purpose of inspection, and the refusal of any licensee to permit such inspection during business hours shall be cause for revocation of such license. The salary of such inspectors shall be fixed by the state board and such salary and expenses shall be paid out of the funds of the state board, and not otherwise, upon the presentation of a verified claim as hereinabove provided.

History: En. Sec. 13, Ch. 104, L. 1929; amd. Sec. 11, Ch. 222, L. 1939.

66-814. (3228.14) **Appeal from actions of the board.** An appeal may be taken from any actions of the said board to the district court of the county in which the applicant resides.

History: En. Sec. 14, Ch. 104, L. 1929.

66-815. (3228.15) Fees. Each applicant for examination to practice or teach shall pay, at the time of such application a fee of ten (\$10.00) dollars. Each person practicing cosmetology as an operator shall pay a fee of three (\$3.00) dollars for the issuance of a license, and the further fee of three (\$3.00) dollars annually for each renewal thereof. Each applicant for a manager-operator license shall pay a fee of five (\$5.00) dollars, for the issuance of such a license and the further sum of five (\$5.00) dollars annually for each renewal thereof. Each person teaching cosmetology shall pay a fee of five (\$5.00) dollars, for the issuance of a license, and the further sum of five (\$5.00) dollars annually for each renewal thereof. Every person, firm, copartnership, or corporation, owning, operating or conducting a school of cosmetology shall pay the sum of twenty-five dollars for a certificate of registration therefor, and pay a further sum of twenty-five (\$25.00) dollars annually for each renewal thereof. Each applicant for apprentice license shall pay an annual fee of three (\$3.00) dollars. Each applicant for itinerant license as a cosmetologist, shall pay a fee of twenty-five (\$25.00) dollars. Such license fees shall be paid annually in advance to the secretary of the board. No other or additional license or fee shall be imposed by any municipal corporation or any other political subdivision of the state of Montana for the practice or teaching of cosmetology.

History: En. Sec. 15, Ch. 104, L. 1929; amd. Sec. 12, Ch. 222, L. 1939; amd. Sec. 3, Ch. 80, L. 1941; amd. Sec. 3, Ch. 20, L. 1955; amd. Sec. 2, Ch. 140, L. 1959.

Collateral References Licenses 29. 53 C.J.S. Licenses § 48.

66-816. (3228.16) Duration and renewal of licenses and certificates—delinquent renewal fee. Licenses and certificates shall be issued for no longer than one year. All licenses and certificates shall expire on the 31st day of December next succeeding unless renewed for the next year. Licenses and certificates may be renewed by application made prior to the 31st day of December of each year, and the payment of a required renewal fee. Expired licenses and certificates may be renewed under special rules adopted by the board.

A fee of two dollars and fifty cents (\$2.50) shall be charged in addition to other fees fixed by law for renewal applications of licenses and certificates made after the 31st day of December of each year, said board shall notify all license holders of expiration date of license not less than thirty (30) days before such expiration date, and call attention to penalty imposed for failure to renew license by date of expiration.

History: En. Sec. 16, Ch. 104, L. 1929; amd. Sec. 13, Ch. 222, L. 1939; amd. Sec. 1, Ch. 115, L. 1961.

Collateral References Licenses 36. 53 C.J.S. Licenses § 42.

66-817. (3228.17) Prohibited acts—penalties—injunctive relief. A. It shall be unlawful without an appropriate license issued under the provisions of sections 66-801 through 66-818, to:

- 1. Practice cosmetology for compensation.
- 2. Own, manage, operate or conduct a school of cosmetology.
- 3. Manage or operate a cosmetology shop or beauty parlor.
- 4. Teach in a school of cosmetology.
- 5. Practice manicuring.
- 6. Practice as a finger waver.
- B. It is unlawful:
- 1. For any person who owns, manages or controls a cosmetology shop to employ or use an unlicensed person as a cosmetologist.
- 2. To operate a cosmetology school without complying with all of the regulations of section 66-803.
- 3. To practice cosmetology in any place other than in a licensed establishment as provided in this chapter except when a licensed operator is requested by a customer to go to a place other than a licensed establishment and is sent to such customer from a licensed establishment.
 - 4. To violate any of the provisions of sections 66-801 through 66-818.
- C. The commission of any of the acts prohibited as provided in subsections A and B hereof or the violation of any other provision in section 66-801 through section 66-818, shall be a misdemeanor punishable by a fine or imprisonment or both fine and imprisonment.
- D. Regardless of any penalties provided in this chapter and as an additional remedy the district courts of the state of Montana are vested with jurisdiction to restrain and enjoin any violation or threatened violation of the requirements of this chapter as a nuisance per se or otherwise

and the board, the attorney general or any county attorney may institute proceedings in equity for the purpose of obtaining equitable relief against violations of the provisions of this chapter.

History: En. Sec. 17, Ch. 104, L. 1929; amd. Sec. 1, Ch. 13, L. 1931; amd. Sec. 14, Ch. 222, L. 1939; amd. Sec. 1, Ch. 140, L. 1959.

Collateral References

Licenses \$40. 53 C.J.S. Licenses \$78.

Liability of barber or beauty shop or specialist for injury to patron. 14 ALR 2d 860.

Regulation of beauty treatment by massage. 17 ALR 2d 1190.

Liability of beauty specialist for injury by X-ray. 41 ALR 2d 338, 385.

66-818. (3228.18) To whom provisions in this act shall not apply. Nothing in this act shall prohibit service in case of emergency or domestic administration without compensation, nor services by persons authorized under the laws of this state to practice dentistry, or to practice the healing art and licensed undertakers, nor services by barbers lawfully engaged in the performance of the usual and ordinary duties of their vocation, or in cutting women's hair by barbers.

History: En. Sec. 18, Ch. 104, L. 1929.

Collateral References

Licenses

8.
53 C.J.S. Licenses § 2.

CHAPTER 9

DENTISTRY—REGULATION OF PRACTICE

- Section 66-901. State board of dental examiners—governor to appoint—vacancies—candidates to be submitted by dental association—qualifications.
 - 66-902. Oath of office—removal.
 - 66-903. Official seal board officers power to administer oaths and hear testimony.
 - 66-904. Meetings—notice—quorum—funds—bond required of secretary-treasurer—duties—accounts.
 - 66-905. Dentistry examinations—application—contents—fees—undergraduate examination—regulations for examination—notice—scope of examination—dentist certificates—fee—form—retention and inspection of examination papers.
 - examination papers.

 66-906. Certificate to be registered in counties where practicing—replacing lost certificates—second examination on failure—admission of dentists from other states—reciprocity—annual license fee—reduction allowed, when—inactive fee—due date of annual fee—revocation of
 - license for failure to pay.

 66-907. County clerk's register of dentists—contents—fee for registration.
 - 66-908. Failure to register certificate as prima-facie proof of lack of authority to practice dentistry.
 - 66-909. Compensation and expenses allowed board members—limitation on duration of examination meetings—employment of counsel to enforce act—secretary-treasurer's compensation—disposal and investment of moneys received.
 - 66-910. Practice of dentistry defined—persons conducting business through licensed dentist—exceptions.
 - 66-911. Duty of county attorney to enforce act—attorney general's duty on appeal—jurisdiction of justice courts—injunction.
 - 66-912. Designations constituting prima-facie evidence of practicing dentistry. 66-913. Revocation or suspension of license—grounds—conviction of crime—
 - 66-913. Revocation or suspension of license—grounds—conviction of crime—renting or loaning license—unprofessional conduct—proceedings for revocation or suspension.
 - 66-914. Judicial review on revocation or suspension of license—procedure—appeals.
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66-919. Practicing dentistry without certificate, penalty for—disposition of fines.

66-920. Affiliation with national association authorized—delegate—expenses allowed.

66-921. Dental hygienists—qualifications—examination—fee—registration—certificate form—re-examination—powers and limitations—revocation of license.

66-922. Annual license fee for dental hygienists—revocation of license for failure to pay.

66-923. Admission of dental hygienists from other states—unlawful to practice without license—licenses for practicing hygienists.

66-924. Recognition of dental schools.

66-925. Citation of act—regulatory board.

66-901. (3115.1) State board of dental examiners—governor to appoint—vacancies—candidates to be submitted by dental association—qualifications. There is hereby created a state board of dental examiners of the state of Montana which board shall consist of five (5) members, and shall be composed of the present member personnel of the board of dental examiners superseded by this act, until the time when their respective terms of office would expire, except for this act and upon the expiration of such respective periods of time for which any member of said board would serve, the governor shall appoint his successor who shall hold office for five (5) years and until his successor shall be appointed and qualify; and thereafter as often as the term of any member of said board shall expire, the governor shall appoint his successor as herein provided for said term of five (5) years.

Any vacancy upon the board caused by the resignation, death or removal of a member shall be filled by the governor by appointment for the unexpired term of that member.

The Montana state dental association shall, through its secretary, present to the governor within fifteen (15) days after its regular annual meeting, a list of the names of not less than five candidates from which appointments for vacancies on the board occurring during the ensuing year may be made, provided that at all times at least three (3) members of the board shall be appointed by the governor from the list of candidates so submitted by the said association. No person shall be eligible to membership on said board of dental examiners who has not been legally qualified to practice, and who has not been engaged in the active practice of dentistry in the state of Montana for at least five (5) continuous years immediately prior thereto, and who does not at the time of his appointment hold a certificate entitling him to practice dentistry in the state of Montana, and who is not a citizen of the United States and a resident of the state of Montana.

History: En. Sec. 1, Ch. 48, L. 1935.

Collateral References

Physicians and Surgeons ≈3 et seq. 70 C.J.S. Physicians and Surgeons § 13.

66-902. (3115.2) Oath of office—removal. Each member of said board hereafter appointed shall before entering upon the duties of his office, take and subscribe an oath or affirmation substantially to the effect that such member will support the constitution and laws of the United States and the

state of Montana, and that such member will faithfully perform the duties of a member of the state board of dental examiners of the state of Montana. The governor may remove any member for neglect or cause, after due notice and full hearing before the governor.

History: En. Sec. 2, Ch. 48, L. 1935.

66-903. (3115.3) Official seal—board officers—power to administer oaths and hear testimony. Said board shall have an official seal of its own design, and shall employ the same to authenticate its acts and records as may be required; and shall, at its annual meeting, choose from its members a president, vice-president and secretary-treasurer, who shall serve at the pleasure of the board. Any member of the board shall have the power to administer oaths and affirmations and said board shall have the power to hear testimony and subpoena witnesses as to all matters relating to the duties imposed upon it by law.

History: En. Sec. 3, Ch. 48, L. 1935.

66-904. (3115.4) Meetings—notice—quorum—funds—bond required of secretary-treasurer—duties—accounts. The board shall meet at least once in each year or oftener at any point in the state of Montana at the call of the president and the secretary-treasurer. Five days' notice must be given by the secretary-treasurer to all board members of the time and place of the meeting of said board. The regular annual meeting of the board shall be held on the second Monday in July of each year. Three members of said board shall constitute a quorum for the transaction of business and its proceedings shall be open to public inspection in all cases of public interest. All moneys received by the board and/or its officers for the board, shall be paid to the secretary-treasurer of the board, who shall be the custodian of the board's receipts and funds, and all disbursements shall be made by him in accordance with this act, and the directors of the board.

The secretary-treasurer shall give bond in such amount as the board may from time to time require, which bond shall be approved by the board, and he shall keep a complete record of all meetings and proceedings of which records the secretary-treasurer shall be custodian, and he shall keep a true and complete account of all moneys received and disbursements made by the board and by him as such officer. The secretary-treasurer shall, not later than the fifteenth day of January of each year, cause to be prepared, a full, true and accurate account of all moneys received, and of all expenditures made, including per diem and expenses of each board member, during the last preceding calendar year, which shall be verified and certified by a certified public accountant employed by the board. A copy of such account shall be delivered to the governor of Montana and like copies shall be mailed to every registered dentist in the state of Montana.

History: En. Sec. 4, Ch. 48, L. 1935.

66-905. (3115.5) Dentistry examinations—application — contents—fees—undergraduate examination—regulations for examination—notice—scope of examination—dentist certificates—fee—form—retention and inspection of examination papers. (1) Any person desiring to commence the practice

of dentistry in the state of Montana after this act takes effect, shall file in his or her full name, an application for examination, with the secretary-treasurer of the state board of dental examiners at least twenty (20) days before the date set by the board for the commencement of such examination, and at the time of making such application the applicant shall (a) pay to the secretary-treasurer of the board a fee of twenty-five (\$25.00) dollars, (b) shall furnish the board with at least three (3) satisfactory affidavits of good moral character, (c) shall present to said board his or her diploma or satisfactory evidence of having graduated from a recognized dental school or college, which must have been approved by said board, and (d) shall furnish the board a recent photograph of the applicant.

- (2) The board may, in its discretion, permit any dental student who shall have successfully completed his or her junior year in a recognized dental school, and who files proof satisfactory to the board that he or she has the preliminary education in this section described, to take written examination in such subjects as he or she has completed, and all satisfactory grades there secured shall be credited upon the final examination of such student. The board shall require a fee of twenty-five (\$25.00) dollars for such examination, which fee shall apply on the final examination to be taken by such applicant.
- (3) The board shall adopt a uniform code of rules and regulations within the limitations of this act, governing the matter of examinations for license to practice dentistry in the state of Montana, which examinations shall be open to any applicant meeting the requirements of this act, and shall also provide in such code for giving reasonable notice of the time and place where examinations shall be held.
- (4) The examination hereinabove referred to shall be practical in character and sufficiently thorough to test the fitness of the applicant to practice dentistry. It shall include, written in the English language, questions on any or all of the following subjects: Anatomy, histology, physiology, chemistry, materia medica and therapeutics, metallurgy, pathology, bacteriology, anesthesia, operative and surgical dentistry, prosthetic dentistry, prophylaxis, and orthodontia, and any additional subjects pertaining to dental service. Said written examination may be supplemented by oral examinations. Demonstrations of the applicant's skill in operative and prosthetic dentistry shall also be required. Said examination shall be conducted under oath or affirmation before said board, and any member of said board is empowered to administer the necessary oath or affirmation. The state board of dental examiners may recognize a certificate granted by the national board of dental examiners in lieu of or subject to such examinations as the state board may require.
- (5) All persons successfully passing such examination shall be registered as licensed dentists in the board register, as hereinabove provided and, upon payment of an additional twenty-five (\$25.00) dollars shall receive a certificate signed by the president and secretary of said board, in substantially the following form, to wit:

"This is to certify that ______ is hereby licensed to practice dentistry in the state of Montana. This certificate must be

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filed for registration in the office of the county clerk of any county in which the dentist holding such certificate desires to practice, and it is unlawful for him or her to practice dentistry in any county in which said certificate is not filed for registration.

Examination papers of any applicant shall be retained two (2) years by the secretary-treasurer of the board and may then be destroyed, and while so retained shall be open to inspection only by board members, the applicant himself, or by some person appointed by such applicant to examine same, or by a court of competent jurisdiction in a proceeding where the question of the contents of such paper or papers is properly involved.

(6) No person shall be qualified to be licensed to practice dentistry in this state or to have issued to him or her a certificate to practice dentistry in this state who is not a citizen of the United States of America.

History: En. Sec. 5, Ch. 48, L. 1935; amd. Sec. 1, Ch. 38, L. 1941; amd. Sec. 1, Ch. 34, L. 1961.

Collateral References

Physicians and Surgeons 5.
70 C.J.S. Physicians and Surgeons § 6.

41 Am. Jur. 162, Physicians and Surgeons, §§ 32 et seq.

What offenses involve moral turpitude within statute providing grounds for denying license. 109 ALR 1459.

Constitutionality, construction, and application of statute regulating dental hygienists. 11 ALR 2d 724.

(3115.6) Certificate to be registered in counties where practicing-replacing lost certificates-second examination on failure-admission of dentists from other states—reciprocity—annual license fee—reduction allowed, when-inactive fee-due date of annual fee-revocation of license for failure to pay. (1) The certificate in this act provided for shall entitle the holder thereof to practice dentistry in any county in the state of Montana, provided such certificate shall first be filed for registration and registered in the office of the county recorder of the county in which such holder desires to practice, and nothing herein contained shall be construed to permit any holder of any certificate to practice in any county in this state unless such certificate shall have been first registered in the office of the recorder of such county as herein provided; provided further that any such holder of a certificate may practice in more than one or in any number of counties in this state on having such certificate registered in each of such counties in which such holder desires to practice. Said board of dental examiners shall, upon satisfactory proof of the loss of any such certificate issued under the provisions of this act, issue a duplicate certificate in place thereof, and a fee of five dollars (\$5.00) shall be charged for issuing such certificate. Any person failing to pass his first examination before such board, may demand a second examination at any subsequent meeting of said board held for the purpose of examining candidates, and no fee shall be charged for any subsequent examination.

(2) Any dentist who has been (1) lawfully licensed to practice in another state or territory which has and maintains a standard for the practice of dentistry or dental surgery which in the opinion of the board is equal to

that at the time maintained in this state, and (2) who is a graduate of an accredited four year high school or has actual scholastic credits equivalent to a four year high school course and (3) who is a graduate of a recognized dental school or college, and (4) who has been lawfully and continuously engaged in the practice of dentistry for five years or more immediately before filing his application to practice in this state and (5) who shall deposit in person with the secretary-treasurer of the board a duly attested certificate from the examining board of the state or territory in which he is registered and/or licensed, certifying to the fact of his registration and license and of his being a person of good moral character and of professional attainments, may, (6) upon the payment of a fee of fifty dollars (\$50.00) and (7) after satisfactory practical examination demonstrating his proficiency, be granted a license to practice dentistry in this state, without being required to take an examination in theory. Provided, however, that no license shall be issued without an examination in theory to any such applicant, unless the state or territory from which such certificate has been granted to such applicant shall have extended a like privilege to engage in the practice of dentistry within its own borders to dentists heretofore and hereafter licensed by this state, and removing to such other state; and provided, further, that the state board of dental examiners of the state of Montana shall have power to enter into reciprocal relations with similar boards of other states whose laws are practically identical with the provisions of this act.

- (3) In addition to the license fee required of applicants every licensed dentist practicing within the state of Montana shall pay in each and every year to the secretary-treasurer of the board, the sum of seven dollars (\$7.00), as a license fee for such year, provided, however, that the board shall have the power to reduce the annual license fee of seven dollars (\$7.00) to the sum of one dollar (\$1.00) or more (but not in excess of seven dollars (\$7.00)] per year when the amount of the balance of cash in the hands of the secretary-treasurer reaches the sum of eight thousand dollars (\$8,000.00), it being the intent of this act that said fund shall be maintained at an approximate level of eight thousand dollars (\$8,000.00). Notice of such change in the amount of dues shall be given to each dentist registered in the state by the secretary-treasurer. In the event the payment of the annual license fee is not made prior to the first day of May by either practicing dentists or dentists not engaged in the active practice within the state of Montana, an additional penalty of three dollars (\$3.00) shall be charged for late payment which shall be in addition to any other fee requirements of this section.
- (4) In the event any registered dentist absents himself from the state for a period of one or more years, or does not engage in active practice within the state of Montana, he may continue his license in good standing by the payment of five dollars (\$5.00) each year, or at the discretion of the board, he may be reinstated upon the payment of a fee of five dollars (\$5.00) for each year's absence. Such annual payments shall be made prior to May first in each and every year, and receipt or certificate therefor shall be issued by the secretary-treasurer of the board. In case of default in payment of annual license fee by any dentist, his license shall be revoked

by the board upon thirty days' notice given to the delinquent of the time and place of considering such revocation. A registered letter addressed to the last known address of the party failing to comply with this requirement, as such address appears upon the records of the board, shall constitute sufficient notice of revocation of license, but no license shall be revoked for such nonpayment if the dentist so notified shall pay such license fee plus the late payment penalty of three dollars (\$3.00) before or at the time fixed for consideration of revocation together with an additional delinquency penalty of five dollars (\$5.00); provided further that said board may collect any such dues by law.

History: En. Sec. 6, Ch. 48, L. 1935; amd. Sec. 2, Ch. 34, L. 1961.

Collateral References

Kind or character of treatment which may be given by one licensed as dentist. 86 ALR 625.

Compiler's Note

The bracket in subd. (3) was inserted by the compiler.

66-907. (3115.7) County clerk's register of dentists—contents—fee for registration. The county clerk of each county in the state of Montana is required to register in a special book to be kept by him for that purpose, to be known as the register of dentists, all certificates issued under the provisions of this act which may be presented to him for that purpose. Such registration shall show the name and place of residence of the certificate holder, the date of the issuance of such certificate, and the date of the registration thereof. After the registration of any such certificate, such county recorder shall return the same with the certificate of its registration, to the party entitled thereto. Such county clerk shall receive for such filing and registration a fee of one (\$1.00) dollar, which shall be paid by the holder thereof.

History: En. Sec. 7, Ch. 48, L. 1935.

66-908. (3115.8) Failure to register certificate as prima-facie proof of lack of authority to practice dentistry. In any prosecution for misdemeanor under the provisions of this act the certificate of the county recorder of the county within which such misdemeanor is alleged to have been committed to the effect that there has been no certificate of the board of dental examiners of the state of Montana, filed and registered in such county recorder's office, issued under the provisions of this act, to the person accused of such misdemeanor, shall be sufficient prima-facie proof that such person is not entitled to practice dentistry in such county.

History: En. Sec. 8, Ch. 48, L. 1935. 70 C.J.S. Physicians and Surgeons §§ 10, 23.

Collateral References

Physicians and Surgeons 5, 6.

66-909. (3115.9) Compensation and expenses allowed board members—limitation on duration of examination meetings—employment of counsel to enforce act—secretary-treasurer's compensation—disposal and investment of moneys received. Out of the funds coming into the possession of the board from the fees and dues charged as hereinabove provided, the sum of fifteen (\$15.00) dollars per day for each day actually engaged in the duties of his office and the amount of the actual railroad and Pullman fares to and

from his place of residence to the place where the meetings of said board are held, shall be paid to each member of said board attending such meetings. Meetings held for the purpose of examining candidates for license to practice dentistry in Montana shall in no case exceed six days. Said board may, if by it deemed advisable, with the consent of the county attorney of any county, employ and compensate out of said fund, special counsel to assist in the prosecution in the courts of such county and in the supreme court of this state, of any offense alleged to have been committed under the provisions of this act in such county. Such expenses shall be paid from the fees received by the board under the provisions of this act. The secretary-treasurer of the board shall receive such reasonable compensation for his services as said board may fix. All moneys received from any source in excess of expenses and salaries above provided for, shall be held by the secretary-treasurer of said board as a special fund for meeting the expenses of said board, the proper administration of this act and for such educational purposes as may be deemed wise by said board. All moneys on hand shall be invested or deposited under the direction of the board, and all moneys received by the board under this act shall be and remain subject to its exclusive custody and control.

History: En. Sec. 9, Ch. 48, L. 1935.

(3115.10) Practice of dentistry defined—persons conducting business through licensed dentist—exceptions. Any person shall be deemed to be practicing dentistry within the meaning of this act who performs, or attempts, or advertises to perform, or causes to be performed by the patient or any other person, or instructs in the performance of, any dental operations or oral surgery or dental service of any kind gratuitously or for a salary, fee, money, or other remuneration paid, or to be paid, directly or indirectly, to himself or to any other person or agency; or who is a manager, proprietor, operator, or conductor of a place where dental operations, oral surgery, or dental services are performed; or who directly or indirectly, by any means or method, furnishes, supplies, constructs, reproduces or repairs any prosthetic denture, bridge, appliance, or other structure to be worn in the human mouth; or who places such appliance or structure in the human mouth or attempts to adjust the same; or who advertises to the public, by any method, to furnish, supply, construct, reproduce, or repair any prosthetic denture, bridge, appliance, or other structure to be worn in the human mouth; or who diagnoses or professes to diagnose, prescribes for or professes to prescribe for, treats, or professes to treat disease, pain, deformity, deficiency, injury, or physical condition of human teeth or jaws, or adjacent structure; or who extracts or attempts to extract human teeth, or corrects or attempts or professes to correct malpositions of teeth or of the jaw; or who gives, or professes to give interpretations or readings of dental roentgenograms; or who administers an anesthetic of any nature in connection with a dental operation; or who uses the words "dentist," "dental surgeon," "oral surgeon," the letters "D. D. S.," "D. M. D.," or any other words, letters, title, or descriptive matter which in any way represent him as being able to diagnose, treat, prescribe, or operate for any disease, pain, deformity,

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deficiency, injury or physical condition of human teeth or jaws, or adjacent structures; or who states, or advertises or permits to be stated or advertised, by sign, card, circular, handbill, newspaper, radio, or otherwise, that he can perform or will attempt to perform dental operations or render a diagnosis in connection therewith or who engages in any of the practices included in the curricula of recognized dental colleges. Provided, however, that a dental laboratory or dental technician shall not be deemed to be practicing dentistry within the meaning of this act when engaged in the construction, making, alteration or repairing of bridges, crowns, dentures, or other prosthetic appliances or surgical appliances or orthodontic appliances if the casts or models or impressions upon which such work is constructed shall have been made by a regularly licensed and practicing dentist and all such crowns, bridges, dentures or prosthetic appliances or surgical appliances or orthodontic appliances shall be returned to the dentist upon whose order the work was constructed. Any licensed dentist who employs or engages the services of any person, firm, or corporation to construct, reproduce, make, alter or repair bridges, crowns, dentures, or other prosthetic appliances or surgical appliances or orthodontic appliances, shall furnish such person, firm or corporation with a written work authorization on forms prescribed by the state board of dental examiners, which shall contain (a) the name and address of the person, firm or corporation to which the work authorization is directed, (b) the patient's name or identification number, but in case only a number is used the patient's name shall be written upon the duplicate copy of the work authorization retained by the dentist, (c) the date on which the work authorization was written, (d) a description of the work to be done, including diagrams, if necessary, (e) a specification of the type and quality of the materials to be used, (f) the signature of the dentist and the number of his license to practice dentistry. The person, firm or corporation receiving a work authorization from a licensed dentist shall retain the original work authorization and the dentist shall retain the duplicate copy thereof for inspection at any reasonable time by the state board of dental examiners or its authorized agents for a period of two (2) years from date of issuance.

Nothing in this act contained applies to a legally qualified physician or surgeon or to a dental surgeon of the United States army, navy, public health service, or veterans' bureau, or to a legal practitioner of another state making a clinical demonstration before a dental society, convention or association of dentists, or to a legally qualified dental hygienist in the performance of his or her duties as provided by law.

No person, firm or corporation engaged in the business of constructing, altering or repairing bridges, crowns, dentures or other prosthetic appliances or surgical appliances or orthodontic appliances shall advertise such services, technique or materials to the general public by means of advertisements in public newspapers, magazines or by radio or television display advertisements or by any other means excepting advertisements in professional or trade papers, trade journals, trade directories, trade periodicals, trade magazines and listings in business and telephone directories limited to name, address and telephone number, which shall

not occupy more than the number of lines necessary to disclose such information, nor shall any person, firm or corporation so engaged in any way directly solicit the patronage of the general public.

History: En. Sec. 10, Ch. 48, L. 1935; amd. Sec. 2, Ch. 38, L. 1941; amd. Sec. 3, Ch. 34, L. 1961.

Collateral References

Physicians and Surgeons 6. 70 C.J.S. Physicians and Surgeons § 1.

Constitutionality and construction of statutes or regulations prohibiting one who has no license to practice dentistry from owning, maintaining or operating an office therefor. 20 ALR 2d 808.

Liability of dentist for injury by X-ray.

41 ALR 2d 385.

Regulation of prosthetic dentistry. 45 ALR 2d 1243.

Duty and liability of person administering anesthetic. 53 ALR 2d 142.

Liability of dentist for extending operation or treatment beyond that expressly authorized. 56 ALR 2d 695.

66-911. (3115.11) Duty of county attorney to enforce act—attorney general's duty on appeal—jurisdiction of justice courts—injunction. shall be the duty of the county attorney of each county wherein an offense is alleged to have occurred, to attend to the prosecution of all complaints made under this act, both upon trial in the justice court where the complaint may be made, and also upon hearing in the district court, either upon such complaint, or upon information or indictment filed against any person under this act in the district court; provided, nothing in this act shall be construed to prevent the prosecution of any person for violation of this act upon the information of the county attorney directly. The attorney general of the state shall appear in the supreme court and attend to the prosecution of all criminal cases arising under this act, which may be appealed to said court, or taken to said court by any appellate process or procedure for review. Justice courts shall have original concurrent jurisdiction in accordance with law of all misdemeanors committed in violation of the provisions of this act. If any person, firm or corporation engages in the practice of dentistry without possessing a valid license so to do or violates any of the provisions of this act, the attorney general, any county attorney or the state board of dental examiners may maintain an action in the name of and in behalf of the state of Montana to enjoin such person, firm or corporation from engaging in the practice of dentistry or otherwise violating the provisions of this The injunction shall not relieve from criminal prosecution but the remedy by injunction shall be in addition to the liability of the offender to criminal prosecution.

History: En. Sec. 11, Ch. 48, L. 1935; amd. Sec. 4, Ch. 34, L. 1961.

(3115.12) Designations constituting prima-facie evidence of practicing dentistry. Whenever any person shall append the word "dentist," or the letters "D. D. S.," "D. M. D.," or like letters to his or her name, in any way, for advertising, or upon any door or sign, or upon or in any writing, or print or publish or use the same in any way, or cause either of the same to be done, the same shall be prima-facie evidence that such person is engaged in the practice of dentistry and subject to the regulations and convictions and penalties of this act.

History: En. Sec. 12, Ch. 48, L. 1935.

Collateral References

Physicians and Surgeons 6. 70 C.J.S. Physicians and Surgeons § 10. DENTISTRY 66-913

66-913. (3115.13) Revocation or suspension of license—grounds—conviction of crime—renting or loaning license—unprofessional conduct—proceedings for revocation or suspension. Any dentist may have his or her license revoked or suspended by the state board of dental examiners for any of the following reasons:

- 1. Conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction or a certified copy thereof, certified by the clerk of the court or by the judge in whose court the conviction is had, shall be conclusive evidence.
- 2. For renting or loaning or attempting to rent or loan to any person his or her license for the practice of dentistry or his or her diploma of graduation from a dental college, school or course to be used as a license or diploma of such person.
- 3. For unprofessional conduct as herein defined or for gross ignorance or inefficiency in his profession, or for habitual intemperance or gross immorality.

Unprofessional conduct shall consist of employing what are known as "cappers" or "steerers" to obtain business; the obtaining of any fee by fraud or misrepresentation; willfully betraving professional secrets; employing, directly or indirectly, any student or any suspended or unlicensed dentist to perform any operations in the practice of dentistry or to treat lesions of the human teeth or jaws or correct malimposed formations thereof; making use of any advertising statements of a character tending to deceive or mislead the public; advertising prices; advertising professional superiority, or performance of professional services in a superior manner; advertising by means of a large display, glaring light sign, or other sign or device containing as a part thereof the representation of a tooth, teeth, bridge work, or any portion of the human head; advertising over the radio in any manner not expressly permitted by this chapter; employing or making use of advertising solicitors or publicity press agents; advertising any free dental work or free examination; advertising to guarantee any dental service or to perform any dental operation painlessly; advertising by sign or printed advertisements under the name of a corporation, company, association or trade name, except that corporations, companies or associations existing and actually engaged in the practice of dentistry prior to the enactment of this chapter may continue operating under such name while conforming to the provisions of this act.

Proceedings under this section may be taken by the board upon its initial motion, for matters within its knowledge, or may be taken upon the information of another; provided, however, that if the informant is a member of the board, the other members of said board shall constitute the board for the purpose of determining the truth of the charge or accusation. All accusations must be in writing, verified by some party familiar with the facts therein charged, and three copies thereof must be filed with the secretary of the board. Upon receiving the accusation the board shall, if it deem the accusation sufficient, make an order setting the same for hearing, and requiring the accused to appear and answer such charge or accusation at said hearing, at a specified time and place, and the secretary shall cause a true copy of said order of the board and of the

accusation or charge to be served upon the accused at least ten (10) days before the day appointed in the order for said hearing.

The process issued by the board, or any member thereof, shall extend to all parts of the state, and may be served by any persons authorized to serve process of courts of record, or by any person designated for that purpose by the board or any member thereof. Proof of service shall be made as provided in civil cases in courts of record and shall be filed with the secretary of the board. The person executing any such process shall receive such compensation as may be allowed by the board, not to exceed the fees now prescribed by law for similar service, and such fees shall be paid in the same manner as provided herein for the fees of witnesses. The accused must appear at the time appointed in the order and answer the charges and make his defense to the same, unless for sufficient cause, upon the accused's application or the board's order, the board assign another day for that purpose.

If the accused does not appear the board may proceed and determine the accusation in his absence. If the accused confess the accusation or refuse to answer the charge, or upon the hearing thereof, the board shall find the charge or accusation (whether one or more) true, it may proceed to an order either revoking the license of the accused or suspending it for a fixed period. The board and the accused may have the benefit of counsel, and the board shall have the power to administer oaths, take depositions of witnesses in the manner provided by law in civil cases, and to issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents and testimony in any inquiry, investigation, hearing or proceeding in any part of the state. Such subpoena shall be issued over the signature of the secretary of the board and the seal thereof, and in the name of the state of Montana.

Upon revocation or suspension of any license the fact shall be noted upon the records of the state board of dental examiners of the state of Montana and the license shall be marked as canceled upon the date of its revocation, or suspended, as the case may be. The secretary of the board shall, upon order of suspension or revocation being entered, transmit to the county recorder wherein the license of the licensee affected by such judgment is registered and recorded, a copy of such order, certified to as such by said secretary of the board, for record, and the same shall be registered in the same manner and in the same book wherein is kept the registration of the certificate to practice dentistry.

History: En. Sec. 13, Ch. 48, L. 1935.

Collateral References

Physicians and Surgeons № 11. 70 C.J.S. Physicians and Surgeons § 16. 41 Am. Jur. 172, Physicians and Surgeons, §§ 44 et seq.

Validity of statute providing for revocation of license of dentist. 5 ALR 94 and 79 ALR 323.

Grounds for revocation of valid license of dentist. 54 ALR 1504 and 82 ALR 1184.

Duty and liability of dentist to patient. 69 ALR 1142 and 129 ALR 101.

What amounts to conviction within statute making conviction grounds for canceling license. 113 ALR 1179.

Pardon as defense to proceeding for suspension or cancellation of license. 126 ALR 257.

Admissibility and necessity of expert evidence in proceeding for revocation of license. 6 ALR 2d 675.

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- 66-914. (3115.14) Judicial review on revocation or suspension of license —procedure—appeals. (1) In case of the revocation or suspension of a license by the said board the licentiate whose license shall have been revoked by the said board shall have the right to judicial review of said revocation or suspension by commencing proper proceedings therefor within 30 days of the filing of the order of cancellation or revocation of said license, including trial de novo. Such review shall be in the district court in and for the county in which was held the meeting of the board in which such order of revocation or suspension was made. In case a person desires to secure such review, with or without trial de novo, he shall within said thirty (30) days serve, or cause to be served, upon the secretary of said board, a written notice of appeal for review which shall contain a statement of the grounds of such appeal, and such person shall also file in the office of the secretary of the board an appeal bond, in an amount not to exceed three hundred (\$300.00) dollars, with good and sufficient surety to be approved by said secretary, running to the state of Montana for the benefit of the board, conditioned for the speedy prosecution of such appeal and the payment of such costs as may be charged against the party appealing upon such appeal.
- (2) Said secretary, within ten days after the service of said notice of appeal, and the filing and approval of said bond, shall (at the expense of the appellant where the evidence is sought to be reviewed) transmit to the clerk of the district court to which said appeal is taken, a certified copy under the seal of said board, the entire record and proceedings before the board including all testimony and evidence taken by said board, together with the bond on appeal. The clerk of such court shall thereupon docket such appeal and the same shall be tried in all respects as ordinary civil actions and like proceedings shall be had as therein. Upon said appeal said cause at the request of appellant or the board, shall be tried de novo, with the right to offer additional evidence by any party. Either party may appeal from the judgment of the district court to the supreme court in the same manner as civil actions may be appealed thereto. The order of the board shall be stayed from the date of the approval of said bond on appeal until final determination of said appeal.

History: En. Sec. 14, Ch. 48, L. 1935.

66-915. (3115.15) Witness fees and mileage. Each witness who shall appear by order of the board, or any member thereof shall be entitled to receive, if demanded, for his attendance the same fees and mileage allowed by law to a witness in civil cases in the district court, which amount shall be paid by the party at whose request such witness is subpoened, unless otherwise ordered by the board. When any witness, who has not been required to attend at the request of any party, is subpoenaed by the board, his fees and mileage may be paid from the funds of the board in the same manner as other expenses of the board are paid. Any witness subpoenaed, except one whose fees and mileage may be paid from the funds of the board, may at the time of service demand the fee to which he is entitled for travel to and from the place at which he is required to appear, and one day's attendance. If such witness demands such fees at the time of service and

they are not at that time paid or tendered, he shall not be required to attend before the board, or a member thereof or referee, as directed in the subpoena.

History: En. Sec. 15, Ch. 48, L. 1935.
70 C.J.S. Physicians and Surgeons § 18;
97 C.J.S. Witnesses § 35 et seq.

Physicians and Surgeons 11; Witnesses 24 et seq.

66-916. (3115.16) Power of district court on hearing—board may procure court order to compel attendance of witnesses-contempt. The district court in and for the county in which any inquiry, investigation, hearing, or proceeding may be held by the board, or any member thereof, shall have the power to compel the attendance of witnesses, the giving of testimony, and the production of papers, books, accounts, and documents as required by any subpoena issued by the board, or any member thereof. The board, or any member thereof, before whom the testimony is to be given or produced, in case of the refusal of any witness to attend or testify or produce any papers required by such subpoena, may report to the district court in and for the county in which the proceeding is pending, by petition, setting forth that due notice has been given of the time and place fixed for the attendance of said witness, or the production of said papers, and that the witness has been summoned in the manner prescribed in this act, and that the witness has failed and refused to attend, or produce the papers required by the subpoena before the board or any member thereof in the case or proceeding named in the notice and subpoena, or has refused to answer questions propounded to him in the course of such proceedings, and ask an order of said court compelling the witness to attend and testify or produce said papers before the board. The court, upon the petition of the board, or any member of the board, shall enter an order directing the witness to appear before the court at the time and place to be fixed by the court in such order, not more than ten days from the date of the order, and then and there show cause why he has not attended or testified, or produced such papers before the board. A copy of said order shall be served upon said witness. If it shall appear to the court that said subpoena was regularly issued by the board, or a member thereof, and regularly served, the court shall thereupon enter an order that said witness appear at the time and place fixed in said order, and testify or produce the required papers, and upon failure to obey said order, said witness shall be dealt with as for contempt of court.

History: En. Sec. 16, Ch. 48, L. 1935.

66-917. (3115.17) Publishing professional cards not unprofessional conduct, when. It shall not be considered unprofessional for a dentist to place in any newspaper or publication, subject to the limitations stated hereafter, a card bearing his name only, together with his or her degree, or the word "dentist," and giving office location, hours and telephone numbers and if he limits his practice to a specialty he may so announce it, or he may announce his absence from, or his return to, practice in the same manner. Such professional card or announcement shall not be run in any newspaper or publication in excess of five (5) issues following the

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opening of his office by a newly licensed dentist, or following the change of location of a dentist's office, or after limiting his practice to a specialty, or after the absenting of a dentist from his practice, or following his return to the practice of dentistry. The publishing of professional cards or announcements in violation of these limitations shall be considered unprofessional. Such card or announcement shall not be more than one column in width, or more than three inches in depth.

History: En. Sec. 17, Ch. 48, L. 1935; amd. Sec. 5, Ch. 34, L. 1961.

Collateral References

Physicians and Surgeons €10. 70 C.J.S. Physicians and Surgeons §§ 3, 17, 32.

- 66-918. (3115.18) Misdemeanors, acts constituting. Any person, company or association shall be guilty of a misdemeanor, and upon conviction thereof shall be punishable with a fine of not less than fifty dollars (\$50.00), nor more than two hundred dollars (\$200.00), or by imprisonment for not more than six (6) months in the county jail or by both such fine and imprisonment, who:
- 1. Shall sell or barter, or offer to sell or barter, any diploma or document, conferring or purporting to confer any dental degee, or any certificate or transcript, made or purporting to be made, pursuant to the laws regulating the license and regulation of dentists; or
- 2. Shall purchase or procure by barter, any such diploma, certificate or transcript, with intent that the same shall be used as evidence of the holder's qualification to practice dentistry, or in fraud of the laws regulating such practice; or
- 3. Shall, with fraudulent intent, alter in a material regard any such diploma, certificate or transcript; or
- 4. Shall use or attempt to use any such diploma, certificate or transcript which has been purchased, fraudulently issued, counterfeited or materially altered, either as a license or color of license to practice dentistry, or in order to procure registration as a dentist; or
 - 5. Shall practice dentistry under a false or assumed name; or
- 6. Shall in an affidavit, required of an applicant for examination, license or registration, under this act, willfully make a false statement in a material regard; or
- 7. Shall engage in the practice of dentistry under any title or name without causing to be displayed in a conspicuous manner and in a conspicuous place in his or her office, the required annual registration certificate for the current year; or
- 8. Shall, within ten days after demand made by the secretary of the board, fail to furnish to said board the name and address of all persons practicing or assisting in the practice of dentistry in the office of said person, company or association, at any time within 60 days prior to said notice, together with a sworn statement showing under and by what license or authority said person, company or association and said employee are and have been practicing dentistry, but said affidavit shall not be used as evidence against said person, company or association in any proceeding under this section.

History: En. Sec. 18, Ch. 48, L. 1935.

Cross-Reference

Administration of narcotic drugs, when use proper, sec. 54-107.

Collateral References

False Pretenses 4 et seq.; Forgery 7; Physicians and Surgeons 4, 5, 10, 11.

35 C.J.S. False Pretenses §§ 1, 4, 6, 19; 37 C.J.S. Forgery § 18 et seq.; 70 C.J.S. Physicians and Surgeons § 29.

Constitutionality and construction of statutes or regulations prohibiting one who has no license to practice dentistry from owning, maintaining or operating an office therefor. 20 ALR 2d 808.

66-919. (3115,19) Practicing dentistry without certificate, penalty for —disposition of fines. Any person who, as principal, agent, employer, employee or assistant, shall practice dentistry in any manner whatever, or who shall do any act of dentistry, without having first secured his or her certificate to practice dentistry from the state board of dental examiners of the state of Montana entitling him or her to so practice in this state, shall be guilty of a misdemeanor, and upon conviction in a district court shall be fined in any sum not less than five hundred dollars (\$500.00) nor more than one thousand dollars (\$1,000.00) or be confined for any period not exceeding six (6) months in the county jail, for each and every offense. All fines imposed and collected under this act shall be paid into the treasury of the county in which such suits, actions or proceedings shall have been commenced. All moneys thus paid into the treasury over and above the amount necessary to reimburse the county for any expense incurred by said county, in any suit, action or proceeding brought under the provisions of this act, shall be paid, before the first day of January of each year, to the secretary-treasurer of the state board of dental examiners of the state of Montana, and become and be a part of the fund to be used by the said state board of dental examiners in the enforcement of the provisions of this act, and shall be used for no other purpose.

History: En. Sec. 19, Ch. 48, L. 1935; amd. Sec. 3, Ch. 38, L. 1941.

Collateral References

Physicians and Surgeons \$\infty\$6(12).

70 C.J.S. Physicians and Surgeons § 30. Right of one licensed as regular physician to practice dentistry. 86 ALR 624.

66-920. (3115.20) Affiliation with national association authorized—delegate—expenses allowed. The said board of dental examiners may affiliate with the national association of dental examiners as an active member, and may pay regular annual dues to said association, and may send a delegate to the meetings of such association, which delegate shall receive as compensation his actual railroad and Pullman fare, or an amount equal to railroad and Pullman fare, to and from the place of meeting of the national dental association, plus an allowance of ten (\$10.00) dollars for each day of actual attendance at such meeting and for each day spent in traveling to and from the place of such meeting.

History: En. Sec. 20, Ch. 48, L. 1935.

Collateral References

Physicians and Surgeons 3.
70 C.J.S. Physicians and Surgeons § 13.

66-921. (3115.21) Dental hygienists—qualifications—examination—fee—registration—certificate form—re-examination—powers and limitations—revocation of license. (1) Said board may also issue licenses to dental assistants to be known as dental hygienists. Every candidate for examination as dental hygienist shall pay the secretary-treasurer of the board a fee

of ten dollars, and shall furnish satisfactory proof that he or she is a graduate of an accredited high school in this state maintaining a complete four (4) year course or a school of like and equal standing in any other state or country, or has actually earned units of study equivalent to those necessary for graduation from such school and who has earned a diploma or certificate from a recognized school of dental hygienists offering a course of study with such equipment and facilities as shall be approved by the board, which shall ascertain and determine what shall constitute a recognized school within the meaning of this act.

(2) Every applicant who shall successfully pass such examination as may be prescribed by the board shall be granted a license as a dental hygienist, and shall be registered as such in a record kept by the secretary of the state dental board, and shall receive a certificate, signed by the president and secretary-treasurer of the board, in substantially the following form, to wit:

Dated at	,	this	 day	of
19	77			

Any applicant for license as dental hygienist failing to pass his or her first examination may take a subsequent examination at any regular meeting of the board without further cost.

(3) Such licensed dental hygienist may remove calcareous deposits, accretion and stains from the exposed surfaces of teeth and from directly beneath the normal free margin of the gums and may prescribe or apply ordinary mouth washes of soothing character, but shall not perform any other operation on the teeth, mouth, or tissues of the oral cavity. Such licensed dental hygienist may operate in the office of a legally licensed dentist or in any state or municipal institution or in public schools, or under a board of health or in any public clinic authorized by said board, but shall not operate in any case except under the direct supervision of a licensed dentist. The board may revoke or suspend the license of any dental hygienist for violating any provision hereof, and may revoke or suspend the license of any registered dentist who shall permit any dental hygienist operating under his supervision to perform any operation other than those permitted under the provisions of this section.

History: En. Sec. 21, Ch. 48, L. 1935.

Collateral References

Physicians and Surgeons ₹3 et seq. 70 C.J.S. Physicians and Surgeons § 3. 41 Am. Jur. 162, Physicians and Surgeons, §§ 32 et seq.

Constitutionality, construction, and application of statute regulating dental hygienists. 11 ALR 2d 724.

66-922. (3115.22) Annual license fee for dental hygienists—revocation of license for failure to pay. Before the first day of May in each year every

licensed dental hygienist shall pay to the board of dental examiners a license fee of \$1.00, and in default of such payment, the board may after hearing and upon thirty (30) days' notice revoke the license of the hygienist in default; but the payment of such fee on or before the time of hearing, with such additional sum as shall be fixed by the board, not exceeding one dollar, shall excuse the default. The board may collect such fee by suit.

History: En. Sec. 22, Ch. 48, L. 1935.

Collateral References

Physicians and Surgeons 5.
70 C.J.S. Physicians and Surgeons § 5.

(3115.23) Admission of dental hygienists from other states unlawful to practice without license-licenses for practicing hygienists. Any dental hygienist duly licensed to practice as such in another state having and maintaining an equal standard of laws regulating the practice of dental hygienists within this state and who is a graduate of an accredited high school maintaining a complete four (4) year course and who is also a graduate of a recognized school of dental hygiene, and who is of good moral character and is desirous of removing to this state, and deposits in person with the board of dental examiners a certificate from the examining board of the state in which he or she is licensed, certifying to the fact of his or her being licensed and that he or she is of good moral character and professional attainments, may, upon the payment of a fee of ten dollars (\$10.00), at the discretion of the board, be granted a license to practice in this state without further examination. As to any person so applying and who has been licensed in a state not maintaining a standard of laws equal to those in force within this state, the board may license such persons upon the payment of the fee provided for above, furnishing the same evidence as to licensing, good moral character, and professional attainments, and passing such further examinations as the board of dental examiners shall deem necessary.

It shall be unlawful for any person, who is not at the time of the passage of this act, employed as a dental hygienist in the office of a regularly licensed dentist in this state, to commence such practice unless such person shall have obtained a certificate, as herein provided.

Any dental assistant who can produce satisfactory evidence that such person has been employed as a dental hygienist in the office of a regularly licensed dentist in the state of Montana for one or more years prior to the passage of this act, may, upon payment of a fee of ten (\$10.00) dollars, be granted a certificate to practice by the state dental board. Such certificate must be secured before such person may continue practice as a hygienist.

History: En. Sec. 23, Ch. 48, L. 1935.

66-924. (3115.24) Recognition of dental schools. In determining what shall constitute a recognized dental college or school and/or a recognized school of dental hygiene, the board shall be guided by the standards, canons and practices required for such recognition by the national association of dental faculties.

History: En. Sec. 24, Ch. 48, L. 1935.

66-925. (3115.25) Citation of act—regulatory board. This act may be known and cited as the "Montana Dentistry Regulation Act" and said state board of dental examiners of the state of Montana is hereby declared to be a regulatory board within the meaning of the proviso of section 79-306.

History: En. Sec. 27, Ch. 48, L. 1935.

CHAPTER 10

MEDICINE—REGULATION OF PRACTICE

Section 66-1001. Qualifications, appointment and term of medical examiners.

66-1002. Organization of board—register—rules.

66-1003. Examination and qualifications of applicants.

66-1004. Examination of applicants for certificates—revocation of certificates—appeals from decision of board.

66-1005. Certificate must be recorded.

66-1006. Exceptions.

66-1007. Practicing medicine without certificate—penalties.

66-1008. Fees for examination for admittance—annual license.

66-1009. Compensation and expenses allowed board member—employment of clerks and counsel—secretary's compensation.

66-1001. (3116) Qualifications, appointment and term of medical examiners. The governor, with the advice and consent of the senate, shall appoint seven learned, skilled, and capable physicians, who shall have been residents of the state of Montana for not less than two years preceding their appointment, not more than two of whom shall be from the same county, and who have attended three courses of lectures, and are graduates of accredited colleges of medicine, who shall constitute the board of examiners for the purpose of this article. The physicians so appointed shall hold their respective offices for seven years; provided, that the terms in office of those constituting the present board shall not be affected by the provisions of this act; and the terms of their successors shall be so arranged as to succeed the present incumbents as their terms expire; and provided, also, that all the vacancies occurring shall be likewise filled by appointment by the governor, with the advice and consent of the senate. Appointments made when the senate is not in session shall take effect immediately, and may be confirmed at the next ensuing session.

History: The first board of medical examiners was created by sections 1 to 9, pp. 175 to 178, Laws 1889. This act was amended by sections 600 to 608, Political Code 1895. The law is here given as it appears with amendments subsequent to 1895.

This section en. Sec. 600, Pol. C. 1895; re-en. Sec. 1585, Rev. C. 1907; re-en. Sec. 3116, R. C. M. 1921.

Cross-References

Jury service, exemption of physicians, sec. 93-1304.

Lien of physician on causes of action, sec. 45-1201.

Constitutionality

The practice of medicine is a proper subject for police regulation. Johnson v.

City of Great Falls, 38 M 369, 374, 99 P 1059.

The act regulating the practice of medicine is not unconstitutional as denying the equal protection of the laws, in that it discriminates in favor of osteopathic practitioners. State v. Dodd, 51 M 100, 149 P 481.

This chapter, regulating the practice of medicine through the state board of medical examiners in the exercise of the state's police power, held not unconstitutional as discriminating against the practice of osteopathy. State v. Thierfelder, 114 M 104, 120, 132 P 2d 1035, overruled on another point in 117 M 26, 35, 156 P 2d 163.

Sufficiency of Proof of Violation

In a prosecution for engaging in the practice of osteopathy without first hav-

ing a license, an allegation that the defendant engaged in the practice "without first having obtained a certificate or license from the state board," etc., is material, and must be established by the state beyond a reasonable doubt; but the evidence as to that matter is sufficient where the record of the secretary of such board discloses that the defendant had never applied to the board for a license or certificate, and there is no evidence to

contradict it. State v. Hopkins, 54 M 52, 64, 166 P 304.

References

State ex rel. State Board of Medical Examiners v. District Court, 26 M 121, 122, 66 P 754.

Collateral References

Physicians and Surgeons \$3. 70 C.J.S. Physicians and Surgeons \$13.

66-1002. (3117) Organization of board—register—rules. The board of medical examiners must, on the second Tuesday of January of each year, elect from among their number a president, vice-president, secretary, and treasurer. The board must adopt a seal, upon which shall appear the words, "The board of medical examiners of Montana" and the further words, "official seal," and all acts, rules and regulations, certificates and licenses shall be authenticated by said seal. Four members of said board shall constitute a quorum. The president and secretary shall have power to administer oaths in examination of applicants for certificates, and to witnesses called before the board in the transaction of business, hearings or other proceedings under the provisions of this act. The board of medical examiners must hold meetings for examinations at the seat of government on the second Tuesday in January and in July of each year, and may hold meetings at such other times and at the same, or other places, as the board or its officers herein authorized may determine. The board must keep a record of all its proceedings and also a register of all applicants for a certificate, with the age of the applicant, time spent in the study of medicine, and the name and location of all the institutions granting to such applicant degrees or certificates of lectures attended, in medicine and surgery. The register must also show whether applicant was rejected, or has received a certificate under this act; such register is prima-facie evidence of the verity of all the matters kept therein. The president or the secretary of the board may call such special meetings of the board as may be deemed advisable or necessary. The board shall have the power to make, prescribe and promulgate rules and regulations to carry out and enforce the terms and provisions of the Medical Practice Act of the state of Montana, and as amended or supplemented, including rules and regulations governing admission by reciprocity.

History: En. Sec. 601, Pol. C. 1895; reen. Sec. 1586, Rev. C. 1907; re-en. Sec. 3117, R. C. M. 1921; amd. Sec. 1, Ch. 132, L. 1943; amd. Sec. 1, Ch. 29, L. 1961.

Sufficiency of Proof of Violation

Where, in a prosecution for engaging in the practice of osteopathy without having first procured a license, it is material to allege that the defendant was not a duly licensed practitioner of medicine or surgery, there is sufficient evidence that he was not such a practitioner where his name does not appear upon the

register of applicants to the board of medical examiners for a certificate to practice, such register being required to be kept by this section, and where the record has been identified as one required by law to be kept, the presumption attaches, under section 93-1301-7, that it has been correctly kept. State v. Hopkins, 54 M 52, 65, 166 P 304.

References

State ex rel. Seres v. District Court, 19 M 501, 506, 48 P 1104.

66-1003. (3118) Examination and qualifications of applicants. Every person who is an applicant to practice medicine and surgery in the state

MEDICINE 66-1003

of Montana shall apply to said board of medical examiners for a certificate so to do. Every person applying shall present his or her diploma to the said board for verification as to its genuineness;

- (a) if the diploma is found to be genuine, and is issued by a university, college or school which conforms to the minimum educational standards for medical colleges as established in the sound discretion of the board of medical examiners of the state of Montana, it being provided that said board shall have the authority, upon investigation of the educational standards and facilities thereof, to approve any medical college, including foreign medical schools and colleges, and
- (b) if the person presenting and claiming said diploma be the person to whom the same was originally granted, said person shall thereupon, submit to an examination at a time and place designated by said board, which may be the time and place of a regular meeting of said board, in and upon each of the following branches of medicine and surgery, to wit: Anatomy and its subdivisions, physiology and pharmacology, bacteriology, pathology, surgery, medicine, obstetrics and gynecology, pediatrics, diseases of the nervous system, diseases of the eye, ear, nose and throat, and such other subjects as the board may prescribe. Said board shall cause such examination to be both scientific and practical, and of sufficient breadth, thoroughness and intensity to test the candidate's fitness to practice medicine and surgery. After examination, such board, if the candidate has been found qualified, shall grant a certificate to such candidate to practice medicine and surgery in the state of Montana, which said certificate can be granted only by the consent of not less than four (4) members of said board, and which said certificate shall be signed by the president and signed and attested by the secretary of said board and authenticated by the seal thereof; provided, however, that in all cases where an applicant for a certificate under this section shall produce and exhibit to said board a genuine certificate from a board of medical examiners (however designated by the law of any other state or a Province of Canada) duly appointed and existing under the laws of any state of the United States or a Province of Canada, and which state or Province of Canada through its said board recognizes certificates or licenses issued by the board of medical examiners of Montana, certifying to the facts:
- (1) that the person presenting such certificate is duly and well qualified to practice medicine and surgery in the state or Province of Canada issuing said certificate, and that said board issuing said certificate has subjected the applicant to a thorough written examination to ascertain this fact, or certifying to the facts;
- (2) that the person presenting such certificate is duly and well qualified to practice medicine and surgery in the state or Province of Canada issuing said certificate; and to the further fact, if such is the case, that said applicant was exempt from examination under the provisions of the law of said state or a Province of Canada, by reason of his residence in said state or a Province of Canada in the active practice of medicine and surgery at the time of the passage in said state or a Province of Canada of said law requiring the examination of applicants to practice medicine and surgery; and if said board of medical examiners is satisfied and finds that

the requirements for admission to the practice of medicine and surgery in such other state or a Province of Canada, past or current, are the equivalent of the Montana requirements; he or she may, in the sound discretion of said board of medical examiners of Montana, upon paying the fee required of applicants for examination under the provisions of section 66-1008, and otherwise complying with all the requirements of the Medical Practice Act of Montana, receive from said board of medical examiners of Montana a certificate to practice medicine and surgery within this state, and upon recording said certificate with the county clerk of the county in which he resides, as provided in section 66-1005, said person shall be a legally qualified practitioner of medicine and surgery in the state of Montana; provided, however, that the board may, in any case of an applicant for admission by reciprocity, require a full written examination of said applicant. During any period intervening between the regular meetings of said board of medical examiners, any person desiring to practice medicine in this state may present his or her diploma to the president or secretary of said board, who may, upon the concurrence of any four (4) members of the board, issue a temporary certificate to practice, valid only until the next regular meeting of said board.

All physicians and surgeons who hold certificates heretofore granted by the existing board of medical examiners of Montana, or who are now legally entitled to practice medicine and surgery in this state, shall be exempt from the provisions of this section. Licenses or certificates to practice medicine and surgery in the state of Montana shall be issued only to citizens of the United States of America or to subjects of the Dominion of Canada who have filed their declaration of intention to become a United States citizen; provided, however, that the board of medical examiners shall have the power to annul and revoke any license or certificate issued to any physician and surgeon who has filed his declaration of intention to become a United States citizen, and who thereafter fails to become naturalized within the time and manner provided for and prescribed by Congress. The board may, by specific regulation, prescribe and enforce reciprocity requirements current with changes in standards in the practice of medicine and surgery.

History: Ap. p. Sec. 602, Pol. C. 1895; amd. Sec. 1, Ch. 13, L. 1903; re-en. Sec. 1587, Rev. C. 1907; re-en. Sec. 3118, R. C. M. 1921; amd. Sec. 2, Ch. 132, L. 1943; amd. Sec. 1, Ch. 119, L. 1957; amd. Sec. 2, Ch. 29, L. 1961.

References

State ex rel. Seres v. District Court, 19 M 501, 505, 48 P 1104; State v. Morris, 22 M 1, 2, 55 P 360; State v. Dodd, 51 M 100, 103, 149 P 481; State v. Askin, 90 M 394, 3 P 2d 654.

Collateral References

Physicians and Surgeons 5.

70 C.J.S. Physicians and Surgeons § 8 et

41 Am. Jur., Physicians and Surgeons, p. 144, §§ 15 et seq.; p. 162, §§ 32 et seq.

Right of corporation or individual not himself licensed, to practice medicine or surgery through licensed employees. 103 ALR 1240.

Practice of medicine through radio broadcasting stations, newspapers, or magazines. 114 ALR 1506.

One who fills prescriptions under reciprocal arrangement with physician as subject to charge of practice of medicine without license. 121 ALR 1455.

Application to masseurs of statutes gov-

Application to masseurs of statutes governing practice of medicine. 17 ALR 2d 1183.

Anesthetic, persons administering, care required. 53 ALR 2d 144.

Fracture or dislocation, degree of care required in diagnosis and treatment. 54 ALR 2d 200, 273.

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Blood transfusion, injury or death from, liability of physician. 59 ALR 2d 786.

Specialist, standard of skill and care required of. 59 ALR 2d 1071.

Eye treatment or surgery, degree of care required. 68 ALR 2d 426.

- 66-1004. (3119) Examination of applicants for certificates—revocation of certificates—appeals from decision of board. (1) No person not heretofore licensed to do so shall be permitted to practice medicine in the state of Montana, unless he shall have first been subjected to a thorough examination as to his qualifications, learning, and professional skill by the state board of medical examiners, nor until he has been issued a certificate by such board, after such examination, admitting him to practice as a physician and surgeon in the state of Montana. The board may refuse to grant a certificate for unprofessional, dishonorable, or immoral conduct.
- (2) Before a certificate can be refused for such cause, the board must serve in writing upon the applicant a copy of any charge or charges against him, and appoint a day for hearing, at which the applicant or any witness in his behalf may appear and give testimony in refutation of such charges. In case the board, after such hearing, refuse a certificate to the applicant, the decision specially stating the ground upon which such refusal was made must be reduced to writing and a copy thereof delivered to the applicant upon demand. Upon a like hearing the board may refuse a certificate to anyone who may publicly profess to cure or treat disease, injury, or deformity, in such a manner as to deceive the public. The hearing provided for herein must take place within twenty days after the service of the copy of the charges upon the applicant, unless further time is granted to the applicant, and the decision of the board must not be later than ten days after the day of hearing. If the decision is not rendered within said period of ten days, the applicant is not subject to any penalties for practicing without a certificate during the time that elapses before the decision is made.
- (3) The board, with the concurrence of four members thereof, may revoke a certificate for unprofessional, dishonorable, or immoral conduct. Before such revocation can take place, a written complaint, specifically stating the charges against the person whose certificate is sought to be revoked, must be delivered to the board, and a copy thereof be served upon such person twenty days before the time fixed by the board for the hearing of such charges. The board must fix the time and place for the hearing, at which the person charged may appear and produce testimony in refutation of such charges. If, after such hearing, the board revoked the certificate of such person, the ground upon which such revocation is made must be specifically stated by the board in writing, and a copy thereof delivered, on demand, to the person whose certificate is revoked.
- (4) In all cases of the refusal or the revocation of a certificate to practice medicine by said board, the person aggrieved thereby may appeal from the decision of the board as hereinafter provided. An appeal may be taken from the action of the state board of medical examiners in refusing to issue a certificate to practice medicine and surgery to any applicant after examination, or from the action of said board in revoking

the certificate of any physician or surgeon, to the district court of the county in which such revocation or refusal was made. The appeal is taken by serving notice of appeal upon the secretary of the board of medical examiners and the attorney general of the state, within thirty days after notice from the board of medical examiners of its decision, and by filing within the same time with the clerk of the proper district court a verified copy of the decision from which the appeal is taken, together with a verified copy of any charge or charges preferred against the applicant and filed with the board of medical examiners.

- The appellant is required, at the time of filing such appeal, to furnish and file with the clerk of the court a good and sufficient bond, to be approved by the clerk of the court, with two good and sufficient sureties, in the sum of three hundred dollars, guaranteeing the payment of all costs of the appeal should the case be decided against the appellant, and the costs shall consist of the sheriff's fees for serving jurors, jurors' fees, and the fees of the clerk of the court. Such appeal shall thereafter be tried by the district court before a jury of six physicians, and in case such jury cannot be obtained in the county where the case is tried, the judge of such court shall order subpoenas for physicians from any adjoining county or counties, which subpoenas shall be served by the sheriff of such adjoining county upon receipt, after the clerk of the court where the subpoena is issued shall have sent by registered mail such subpoena to such sheriff. Bias or prejudice or fixed opinion shall constitute a ground of challenge to a jury for cause, and the appellant and the medical board shall each have the right to peremptorily challenge not more than two of such jurors.
- (6) When the jury shall have been selected and sworn to try the cause, they constitute a higher examining board for the purpose of inquiring into whether or not the judgment of the board of medical examiners should be affirmed or overruled upon the issues presented to such board, and such jury may make such examination of the appellant as they may deem necessary or desirable. It shall take four of the jury to render a verdict, and no member of the medical board is qualified to act as a juror. The attorney general is hereby made the attorney for said board. Jurymen subpoenaed under this act shall be entitled to mileage at the rate of ten cents per mile for each and every mile by them actually traveled in attending upon the court, and of six dollars per day for their services.

History: Ap. p. Sec. 603, Pol. C. 1895; amd. Sec. 1, Ch. 95, L. 1903; amd. Sec. 1, Ch. 100, L. 1907; Sec. 1588, Rev. C. 1907; re-en. Sec. 3119, R. C. M. 1921; amd. Sec. 3, Ch. 29, L. 1961.

Cross-References

Acting while intoxicated, penalty, sec. 95-35-108.

Application of Montana Rules of Civil Procedure to this section, sec. 93-2711-7. Liquor prescriptions, sec. 4-136. Narcotic drugs, regulations, sec. 54-107.

A mnool

Whether acting under its general con-

stitutional powers or as exercising a special and limited jurisdiction derived exclusively from the statute, the district court has no power to allow an applicant to practice medicine pending his appeal from a refusal of the state board of medical examiners to grant him a certificate. State ex rel. State Board of Medical Examiners v. District Court, 26 M 121, 124, 66 P 754.

The application of a physician to the district court to have the action of the state board of medical examiners, in revoking his license for alleged unprofessional and dishonorable conduct, judicially determined, is a special proceeding, from

the judgment in which an appeal lies to the supreme court, if taken within one year; but he cannot, after the time for the appeal has elapsed, have the judgment reviewed and annulled on writ of review. State ex rel. Gattan v. District Court, 39 M 134, 136, 101 P 961.

Charges Instituted by Board

Necessity prevents the disqualification of the board from hearing charges instituted by it, since no other body is given the jurisdiction to hear such charges. State ex rel. Yuhas v. Board of Medical Examiners, 135 M 381, 339 P 2d 981.

Notice of Revocation

Though the board of medical examiners is empowered to revoke a certificate for unprofessional, dishonorable or immoral conduct, it cannot arbitrarily revoke the certificate of a physician without reasonable notice of the charge against him and the time and place of the trial. State v. Schultz, 11 M 429, 434, 28 P 643.

Unprofessional Conduct

The provision of subdivision (4) author-

izing the board to revoke a physician's certificate "for unprofessional, dishonorable, or immoral conduct" gives the board jurisdiction to hear charges involving an attempted abortion, unauthorized removal of X-rays, overcharges for services not performed, and the encouragement of fraudulent claims before the industrial board for injuries not received. State ex rel. Yuhas v. Board of Medical Examiners, 135 M 381, 339 P 2d 981.

References

State ex rel. Seres v. District Court, 19 M 501, 503, 48 P 1104; State ex rel. Riddell v. District Court, 27 M 103, 106, 69 P 710; State ex rel. Hackshaw v. District Court, 48 M 477, 481, 138 P 1100; Thien v. Wiltse, 49 M 189, 194, 141 P 146.

Collateral References

Applicability of statute of limitations or doctrine of laches to proceeding to revoke license to practice medicine. 63 ALR 2d 1080.

Physician's duty to inform patient of nature and hazards of disease or treatment. 79 ALR 2d 1028.

66-1005. (3120) Certificate must be recorded. Every person obtaining a certificate from the board must, within sixty days from the date thereof, have the same recorded in the office of the county clerk in the county wherein he resides; if he removes from one county to another to practice medicine or surgery, his certificate must immediately be recorded in the county to which he removes. The county clerk must endorse upon the certificate the date of record, and he is entitled to charge and receive his usual fees for such services, the fee to be paid by the applicant. Until the certificate be recorded, as provided by this section, the physician practicing under it is subject to the penalties prescribed in the Penal Code for practicing without a certificate.

History: En. Sec. 604, Pol. C. 1895; re-en. Sec. 1589, Rev. C. 1907; re-en. Sec. 3120, R. C. M. 1921.

NOTE.—The reference to the Penal Code in the above section apparently was to

Sec. 706, Pen. C. 1895, re-en. Sec. 8544, Rev. C. 1907, which was repealed by Ch. 109, Laws 1921. Section 66-1007 prescribes the penalty for practicing medicine without a certificate.

66-1006. (3121) Exceptions. This act shall not apply to midwives of skill and experience, commissioned surgeons of the United States army and navy in the discharge of their official duties, nor to physicians and surgeons in actual consultation from other states and territories.

History: En. Sec. 605, Pol. C. 1895; re-en. Sec. 1590, Rev. C. 1907; re-en. Sec. 3121, R. C. M. 1921.

References

State v. Wood, 43 M 566, 570, 165 P 592.

66-1007. (3122) Practicing medicine without certificate—penalities. (1) Any person practicing medicine or surgery within this state without first having obtained a certificate to practice, as provided by law, and after his certificate to practice has been revoked, or contrary to the provisions

of this article, shall for each violation of the provisions of this code, or any act relating to the practice of medicine or surgery in this state, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than one thousand dollars (\$1,000.00), nor less than two hundred and fifty dollars, (\$250.00), or by imprisonment in the county jail not exceeding one year, nor less than ninety (90) days, or by both said fine and imprisonment, as the court may determine.

(2) Any person shall be regarded as practicing within the meaning of this article who shall append or affix the letters M. B. or M. D., or the title of Dr., or Doctor, or any other sign or appellation in a medical sense to his or her name, who shall publicly profess to be a physician or a surgeon, who shall publicly profess either on his own behalf, in his own name, in his trade name, or on behalf of any other person, corporation, association, partnership, either as manager, bookkeeper, solicitor, or other agent, to cure, treat, relieve, or palliate any ailment, disease, or infirmity of the mind or body of another by using or prescribing any drug, medicine, or surgical treatment, or who shall recommend, prescribe, or direct, for the use of any person, any drug, medicine, appliance, apparatus, or other agency, whether material or not material, for the cure, relief, or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound, fracture, or bodily injury, or other deformity, after having received, or with the intent of receiving therefor, either directly or indirectly, any bonus, gift, or compensation; provided, however, that nothing in this section shall be construed to restrain or restrict any legally licensed osteopathic practitioner and chiropractors practicing under the laws of this state. Nothing in this act shall prohibit any legally licensed pharmacist or mercantile dealer from selling any drugs or medicines which are now allowed to be sold under the laws of the state of Montana or the United States

History: En. Sec. 606, Pol. C. 1895; amd. Sec. 1, Ch. 101, L. 1907; Sec. 1591, Rev. C. 1907; re-en. Sec. 3122, R. C. M. 1921; amd. Sec. 3, Ch. 132, L. 1943.

Charged Merely with Practicing Medicine without License Entitles Defendant to Bill of Particulars

Where the statute under which one is charged with a public offense sets forth a number of ways in which the offense may be committed, such as this section, the accused is entitled to know what particular portion of the section he is accused of violating, and by entering a plea of not guilty the accused may not be held to have waived his right to a bill of particulars. There is no statute in Montana requiring it, but the right exists by virtue of the provisions of both federal and state constitutions—to know the nature and cause of the accusation. State ex rel. Wong Sun v. District Court, 112 M 153, 156, 113 P 2d 996.

Evidence to Support Conviction

A conviction upon an information drawn under this section, which undertook to

state the circumstances of the offense with unnecessary particularity, and in doing so confined the charge to the giving of a particular prescription, held not justified by the evidence. State v. Morris, 45 M 334, 122 P 917.

Information

Information charging the practice of medicine without a license, following the general form prescribed by section 94-6404, and in substantial compliance with subds. 6 and 7 of section 94-6412, requiring that the offense charged be so set forth in ordinary and concise language as to enable a person of common understanding to know what is intended, and with such a degree of certainty as to enable the court to pronounce judgment upon conviction, held sufficient. State v. Thierfelder, 114 M 104, 110, 132 P 2d 1035, overruled on another point in 117 M 26, 35, 156 P 2d 163. A substantial compliance with the stat-

A substantial compliance with the statutory provisions relative to what an information must contain and the form thereof sections 94-6403 to 94-6405, viewed in the light of section 94-6413, declaring that no defect or imperfection in its form shall

render it insufficient which does not tend to the prejudice of a substantial right of defendant upon its merits, is all that is required, and under this rule an information charging defendant with practicing medicine without a license held not open to attack as not charging a public offense. State v. Wong Sun, 114 M 185, 190, 133 P 2d 761.

Medicine and Surgery the Same

Where an osteopath was charged with practicing medicine (removing tonsils) without a license, his contention that the information was fatally defective in that, if he was guilty of any offense it was practicing surgery, held of no merit, the practice of medicine and surgery being considered as one under the statutes and by long acceptation by the people generally. "Osteopathy," as defined by its founder, dictionaries and decisions of courts, briefly stated, "administers no drugs and uses no knife." State v. Thierfelder, 114 M 104, 118, 132 P 2d 1035, overruled on another point in 117 M 26, 35, 156 P 2d 163.

Osteopaths

By the adoption of the proviso relating to osteopaths, their status was not affected so as to permit them to practice medicine or surgery, and the section is not open to the objection that it denies to every person, except osteopaths, the right to practice medicine or surgery without a certificate from the state board of medical examiners. State v. Dodd, 51 M 100, 105, 149 P 481; State v. Wood, 53 M 566, 571, 165 P 592; State v. Hopkins, 54 M 52, 59, 166 P 304.

Penalty-Jurisdiction in District Court

Whether an osteopath charged with practicing medicine and surgery without a license is prosecuted under this section or section 66-1406, the case falls within the exclusive jurisdiction of the district court, and not within that of the justice of the peace. Section 66-1408 prescribes the penalty for violation of section 66-1406, both having the same history, Ch. 51, Laws 1905. In both instances the penalty exceeds justice court jurisdiction, i. e., a fine not exceeding \$1,000 and imprisonment not exceeding one year. State ex rel. Freebourn v. District Court, 105 M 77, 79, 69 P 2d 748.

Physiotherapy

The practice of physiotherapy constitutes the practice of medicine under Montana law. State v. Bain, 130 M 90, 295 P 2d 241, 243.

Where a person represented himself as Dr. Bain, physiotherapist, there was a violation of this section since physiotherapy is the practice of medicine and the affixing of the word "Dr." was in a medical sense. State v. Bain, 130 M 90, 295 P 2d 241.

References

State v. Morris, 22 M 1, 2, 55 P 360; Swanz v. Clark, 71 M 385, 388, 229 P 1108.

Collateral References

Constitutionality and construction of statutes or regulations prohibiting one who has no license to practice dentistry or medicine from owning, maintaining, or operating an office therefor. 20 ALR 2d 808.

66-1008. (3123) Fees for examination for admittance—annual license.

- (1) Candidates for examination shall pay in advance to the secretary of the board of medical examiners a fee of seventy-five dollars (\$75.00), which fee shall defray the entire expenses of said candidate for examination before the board of medical examiners. Anyone failing to pass the required examination shall be entitled to a second examination within six months without additional fee. Candidates who shall be granted certificates to practice medicine and surgery in the state of Montana under the reciprocity provisions of section 66-1003 without examination, shall, before receiving certificate of authorization to practice medicine in this state, pay to the secretary of the board of medical examiners a fee of one hundred dollars (\$100.00).
- (2) In addition to the respective license fees required of applicants, every licensed physician and surgeon practicing within the state of Montana shall pay each and every year to the secretary of the board, an annual registration fee not to exceed the sum of ten dollars (\$10.00), as may be prescribed by the board. The moneys so received from the foregoing and every other source, shall be turned over, by said secretary, to

the state treasurer, and shall be by the state treasurer deposited in the board of medical examiners fund as provided by law. In the event any person licensed to practice medicine absents himself from the state for a period of one or more years, or does not engage in active practice within the state of Montana, he may continue his license in good standing by the payment of three dollars (\$3.00) each year, or, at the discretion of the board, he may be reinstated upon the payment of a fee of three dollars (\$3.00) for each year's absence.

Such annual payments for registration shall be made prior to January first in each and every year, and receipt of certificate of annual registration therefor shall be issued by the secretary of the board. In case of default in the payment of the annual registration fee by any person licensed to practice medicine and surgery, his underlying certificate to practice medicine and surgery shall be revoked by the board upon thirty (30) days' notice given to the delinquent of the time and place of considering such revocation. A registered letter addressed to the last known address of the person failing to comply with the requirement of annual registration, as such address appears upon the records of the board, shall constitute sufficient notice of intention to revoke his underlying certificate, but no certificate shall be revoked for such nonpayment if the person authorized to practice medicine, and so notified, shall pay such annual registration fee before or at the time fixed for consideration of revocation together with a delinquency penalty of ten dollars (\$10.00); provided further, that said board may collect any such dues by action at law.

History: Ap. p. Sec. 607, Pol. C. 1895; 1921; amd. Sec. 1, Ch. 68, L. 1927; amd. amd. Sec. 1, Ch. 114, L. 1907; Sec. 1592, Sec. 4, Ch. 132, L. 1943; amd. Sec. 4, Ch. Rev. C. 1907; re-en. Sec. 3123, R. C. M. 29, L. 1961.

66-1009. (3124) Compensation and expenses allowed board member employment of clerks and counsel—secretary's compensation. ber of the board is hereby allowed the sum of twenty dollars (\$20.00) per day and mileage while in the active and necessary discharge of his duties as a member of said board. There is hereby established a fund to be known as the board of medical examiners fund. All moneys in such fund shall only be paid out by warrant drawn on said fund after an order therefor drawn by the secretary, and countersigned by the president, of said board. The rate of mileage and attendance of witnesses before said board shall be the same as is now allowed in justice of the peace courts. The board must report annually on the first Monday of November to the governor, which report must show all the transactions of the board, giving the number of applications received, and from whom received, the number of certificates granted and those rejected, giving the reasons therefor, the amount of money received, the expenses, the fees and mileage paid, and by whom received, and the amount of money remaining in said fund. The board may employ such clerical help and legal counsel as may be necessary to carry out the terms and provisions of this act. Such clerical help and counsel must be compensated only out of the said fund as fixed by the board. The secretary of the board shall receive such reasonable compensation for his services as may be fixed by said board.

History: En. Sec. 608, Pol. C. 1895; reen. Sec. 1593, Rev. C. 1907; re-en. Sec. 3124, R. C. M. 1921; amd. Sec. 1, Ch. 68, L. 1927; amd. Sec. 5, Ch. 132, L. 1943; amd. Sec. 5, Ch. 29, L. 1961.

References

State ex rel. State Board of Medical Examiners v. District Court, 26 M 121, 122, 66 P 754; Johnson v. City of Great Falls, 38 M 369, 374, 99 P 1059; State v. Hopkins, 54 M 52, 57, 166 P 304.

CHAPTER 11

MOTOR CLUB SERVICE COMPANIES—REGULATION

Section 66-1101. Terms defined.

Companies and agents must be licensed. 66-1102.

66-1103. Requirements for license.

66-1104. Deposits required.

66-1105. Expiration of license. 66-1106. Revocation of license.

Financial statement to be filed. 66-1107.

Service contract must be filed with commissioner. 66-1108.

66-1109. Contracts must be in duplicate.

66-1110. Form of contract.

66-1111. Companies must be licensed.

66-1112. Contract must not be misrepresented.

66-1113. Contracts binding on company although not complying with act.

Act shall not apply-when. 66-1114.

66-1115. Penalty for violation.

(4211.1) Terms defined. The following words and phrases, 66-1101. when used in this act shall, for the purpose of this act, have the meanings respectively ascribed to them in this section, except in those instances where the context of the act clearly indicates that they shall have a different meaning:

"Commissioner." The commissioner of insurance of the state of Montana or his assistants or deputies or other persons authorized to act for him.

"Company." Any person, firm, copartnership, company, association or corporation engaged in selling, furnishing or procuring, either as principal or agent, for a consideration, motor club service as herein defined.

"Agent." Whoever solicits the purchase of service contracts, as herein defined, or transmits for another any such contract or application therefor to or from the company, or acts or aids in any manner in the delivery or negotiation of any such contract, or of the renewal or continuance thereof.

"Towing Service." Any act or acts by a company, as herein defined, consisting of the drafting or moving of a motor vehicle from one place to another under other than its own power.

"Emergency Road Service." Any act or acts by a company, as herein defined, consisting of the adjustment, repair or replacement of the equipment, tires or mechanical parts of any automobile so as to permit it to be operated under its own power.

"Bail Bond Service." Any act or acts by a company, as herein defined, the purpose of which is to furnish or procure for any person accused of violation of any law of this state a cash deposit, bond or other undertaking required by law in order that the accused might enjoy his personal freedom

"Legal Service." Any act or acts by a company, as herein defined, consisting of the hiring, retaining, engaging or appointing of an attorney

or other person to give professional advice to or represent holders of service contracts with any such company in any court, as the result of liability incurred by the right of action accruing to the holder of a service contract as a result of the ownership, operation, use or maintenance of a motor vehicle.

"Discount Service." Any act or acts by a company, as herein defined, resulting in the giving of special discounts, rebates or reductions of price on gasoline, oil, repairs, insurance, parts, accessories or service for motor vehicles, to holders of service contracts with any such company.

"Financial Service." Any act or acts by a company, as herein defined, whereby loans or other advances of money, with or without security, are made to holders of service contracts with any such company.

"Buying and Selling Service." Any act or acts of a company, as herein defined, whereby the holder of a service contract with any such company is aided in any way in the purchase or sale of an automobile.

"Theft Service." Any act or acts by a company, as herein defined, the purpose of which is to locate, identify or recover a motor vehicle owned or controlled by the holder of a service contract with any such company which has been or may be stolen or to detect or apprehend the person guilty of such theft.

"Map Service." Any act or acts by a company, as herein defined, by which road maps are furnished without cost to holders of service contracts with any such company.

"Touring Service." Any act or acts by a company, as herein defined, by which touring information is furnished without cost to holders of service contracts with any such company.

"Motor Club Service." The rendering, furnishing or procuring of towing service, emergency road service, insurance service, bail bond service, legal service, discount service, financial service, buying and selling service, theft service, map service and touring service, or any three or more thereof, as herein defined, to any person or persons in connection with the ownership, operation, use or maintenance of a motor vehicle by such other person or persons in consideration of such other person or persons being or becoming a member or members of any company, rendering, procuring or furnishing the same, or being or becoming in any manner affiliated therewith, or being or becoming entitled to receive membership or other motor club service therefrom by virtue of any agreement or understanding with any such company.

"Service Contract." Any agreement or understanding whereby any company, as herein defined, for a consideration promises to render, furnish or procure for any other person or persons, whether they be members of such company or otherwise, motor club service, as herein defined.

History: En. Sec. 1, Ch. 131, L. 1931. Collaters

Collateral References
Associations©=2.
7 C.J.S. Associations § 2.

66-1102. (4211.2) Companies and agents must be licensed. No company, nor any agent, as herein defined, doing business in this state shall execute, issue or deliver any service contract to any person or persons owning or

operating motor vehicles without first having obtained a license from the commissioner as provided for in this act, nor shall any such company or agent collect or receive from any person or persons in advance of the execution, issuance or delivery of any such service contract any money or other thing of value upon any promise or agreement to execute, issue or deliver any such service contract, without first having obtained a license from said commissioner, as provided for in this act.

History: En. Sec. 2, Ch. 131, L. 1931. Collateral References

Licenses € 11(1).
53 C.J.S. Licenses § 30.

- **66-1103.** (4211.3) Requirements for license. (a) No license shall be issued by the commissioner until the company has filed with him the following:
- 1. A formal application in such form and detail as the commissioner may require, executed under oath by its president or other principal officer;
 - 2. A copy of the form of its contract;
- 3. A certified copy of its charter or articles of incorporation and its bylaws, if any;
- 4. A financial statement in such form and detail as the commissioner may require, executed on oath by its president or other principal officer;
- 5. A certificate from the state treasurer of the state of Montana that it has complied with section 66-1104 in all cases where a deposit of cash or a bond is required by this act;
- 6. A certificate from the corporation commissioner of the state of Montana, in the event it be a corporation, that it has complied with the corporation laws of said state.
- (b) Fee. No license shall be issued by the commissioner until the company has paid to the commissioner one hundred dollars (\$100.00) as an annual license fee, or the pro rata portion thereof necessary to be paid to the end of the current calendar year from the date of the application for such license.
- (c) Examination. No license shall be issued by the commissioner until the company has satisfied him by such examination as he may make and such evidence as he may require, in his discretion, that such company has complied with the laws of the state of Montana and that its management is trustworthy and competent.

History: En. Sec. 3, Ch. 131, L. 1931.

Collateral References
Licenses \$22.
53 C.J.S. Licenses \$39.

66-1104. (4211.4) Deposits required. No license shall be granted to a company as herein defined, except as hereinafter stated until it has deposited with the state treasurer of the state of Montana the sum of twenty-five thousand dollars (\$25,000.00) in cash or in lieu thereof a bond in a form prescribed by the commissioner payable to the state of Montana in the sum of twenty-five thousand dollars (\$25.000.00), with surety approved by the commissioner, conditioned upon the faithful performance of its service contracts and payment of any fines or penalties levied against it for failure to comply with this act; provided, however, that when any company, as

herein defined, shall prove to the commissioner that it has been in continuous, active operation in the state of Montana for a period of more than five (5) years immediately last past and has a paid membership of more than five thousand (5,000) members within the state of Montana, or that there are more than five thousand (5,000) holders of its service contracts within the state of Montana, and that it is being properly managed, is rendering to its members the services promised to them, and is financially responsible, no such cash deposit or bond shall be required while such company remains in such condition. The foregoing cash deposit or bond is not required in any instance as a penalty, but for the protection of the public only.

History: En. Sec. 4, Ch. 131, L. 1931.

Collateral References
Licenses©26.
53 C.J.S. Licenses § 36.

66-1105. (4211.5) **Expiration of license.** Every license issued hereunder shall expire annually on January 1, of each year, unless sooner revoked or suspended, as hereinafter provided.

History: En. Sec. 5, Ch. 131, L. 1931.

Collateral References
Licenses 36.
53 C.J.S. Licenses § 43.

66-1106. (4211.6) **Revocation of license.** If the commissioner shall, at any time for cause shown and after a hearing, determine that a company has violated any provision or provisions of this act, or that it is insolvent, or that its assets are less than its liabilities, or that it or its officers refuse to submit to an examination, or that it is transacting business fraudulently, or that its management or business methods are improper or hazardous to the holders of its service contracts, he shall thereupon revoke or suspend its license and shall give notice thereof to the public in such manner as he may deem proper.

History: En. Sec. 6, Ch. 131, L. 1931.

Collateral References
Licenses 38.
53 C.J.S. Licenses § 44.

66-1107. (4211.7) Financial statement to be filed. Every company shall annually, on or before February 1 of each year, file with the commissioner a financial statement in such form and detail as he may prescribe, executed on oath by its president or other principal officer, showing its financial condition on December 31 of the preceding year.

History: En. Sec. 7, Ch. 131, L. 1931.

Collateral References
Insurance©=9.
44 C.J.S. Insurance § 73.

66-1108. (4211.8) Service contract must be filed with commissioner. No service contract shall be executed, issued or delivered in this state until a copy of the form thereof has been on file for thirty (30) days with the commissioner, unless before the expiration of said thirty (30) days he shall have approved the form in writing; nor shall any service contract be executed, issued or delivered at any time in this state if the commissioner notified the company, in writing, within said thirty (30) days, that in his

opinion the form of the contract does not comply with the laws of this state, specifying the reasons therefor.

History: En. Sec. 8, Ch. 131, L. 1931.

Collateral References

Insurance ≈ 10. 44 C.J.S. Insurance § 57, 58, 74.

66-1109. (4211.9) **Contracts must be in duplicate.** Every service contract, executed, issued or delivered in this state shall be made in duplicate, and shall be signed by the company issuing the same, or by its duly authorized agent, and by the party purchasing the same, and one copy thereof shall be kept by said company, and the other copy shall be delivered to the party purchasing the same.

History: En. Sec. 9, Ch. 131, L. 1931.

Collateral References

Associations ≈13, 19. 7 C.J.S. Associations §§ 12, 15, 16, 28, 9, 32.

- 66-1110. (4211.10) Form of contract. No service contract shall be executed, issued or delivered in this state unless it contains the following:
 - (a) The exact corporate or other name of the company;
- (b) The exact location of its home office and of its usual place of business in this state, giving street number and city;
- (c) A provision that the contract may be canceled at any time by either the company or the holder, and that the holder shall, if he has actually paid the consideration, thereupon be entitled to the unused portion of the consideration paid for such contract, calculated on a pro rata basis without any deductions;
- (d) A provision plainly specifying the services promised and that the holder shall not be required to pay any sum for any services specified in the contract in addition to the amount specified in the contract, and further specifying the territory wherein such services are to be rendered, and the date when such service shall commence.

History: En. Sec. 10, Ch. 131, L. 1931.

66-1111. (4211.11) **Companies must be licensed.** No person shall solicit or aid in the solicitation of another person to purchase a service contract issued by a company not duly licensed under this act.

History: En. Sec. 11, Ch. 131, L. 1931.

Collateral References

Licenses 39. 53 C.J.S. Licenses § 59.

66-1112. (4211.12) Contract must not be misrepresented. No company and no officer or agent thereof, shall orally or in writing misrepresent the terms, benefits or privileges of any service contract issued or to be issued by it.

History: En. Sec. 12, Ch. 131, L. 1931.

66-1113. (4211.13) Contracts binding on company although not complying with act. Any service contract made, issued or delivered contrary to any provision of this act shall nevertheless be valid and binding on the company.

History: En. Sec. 13, Ch. 131, L. 1931.

66-1114. (4211.14) Act shall not apply—when. Nothing in this act shall apply to a duly authorized attorney at law acting in the usual course of his profession, nor to any insurance company, bonding company, or surety company, now or hereafter duly and regularly licensed and doing business as such under the laws of the state of Montana.

History: En. Sec. 14, Ch. 131, L. 1931. Collateral References Associations 2.

7 C.J.S. Associations § 2.

66-1115. (4211.15) Penalty for violation. If any person shall violate the provisions of this act, such person shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars (\$500.00), or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment.

History: En. Sec. 15, Ch. 131, L. 1931. Collateral References

Associations № 27.
7 C.J.S. Associations § 17.

CHAPTER 12

NURSING—REGULATION OF PRACTICE

Section 66-1201 to 66-1220. Repealed.

66-1221. Purpose.

66-1222. Citation of act—definition of board—identification of board when administering act for professional nursing and for practical nursing and for practical nursing and for practical nursing and formal definition of the professional nursing and for practical nursing and formal definition of the professional nursing and formal definition of the professional nursing and for practical nursing and formal definition of the professional nursing and for practical nursing and formal definition of the professional nursing and definitio

ing-definition of terms.

66-1223. Creation of the Montana state board of nursing—dual functions—addition of practical nurses to membership of board when functioning in field of practical nursing—appointment—term of office—removal of members from office—seal—board records public—legal counsel.

66-1224. Qualifications of members of board in the respective administrations of professional and practical nursing.

66-1225. Organization—duties and powers—separation of records responsive to functions of board—dual administrations to be exclusive of each other.

66-1226. Reimbursement for expenses—compensation.

66-1227. Qualifications of applicants for license to practice professional nursing.

66-1228. License—by examination—by endorsement without examination—license fees.

66-1229. Title and abbreviation of registered nurse.

66-1230. Nurses registered under previous law deemed licensed hereunder.

66-1231. Qualifications of applicants for licensed practical nurse.

66-1232. License of practical nurse by examination—by endorsement without examination.

66-1233. Waiver of certain requirements for licensing practical nurses before July 1, 1955.

66-1234. Fee.

66-1235. Title and abbreviation of licensed practical nurse.

66-1236. Renewal of license.

66-1237. Fund—administration and use—transfer of funds from Montana state board of nurse examiners.

66-1238. Schools of nursing-application for approval.

66-1239. Survey and approval. 66-1240. Grounds for discipline.

66-1241. Disciplinary proceedings. 66-1242. Exemption of persons from act—when and under what circumstances.

66-1243. Violation of act—penalties. 66-1244. Injunctions. 66-1245. Co-ordination with preceding board—transfer of records and funds to board created by the within act.

66-1201 to 66-1220. Repealed—Chapter 243. Laws of 1953.

Repeal

These sections (Secs. 1 to 3, 3a to 3d, 4a to 4e, 5, 6, 7a, 7b, 8a, 8b, 9, 10 of Ch. 253, L. 1947), relating to the regulation of nursing, were repealed by Sec. 27, Ch.

243, Laws 1953, effective at noon meridian July 1, 1953. For new law governing the regulation of nursing, see secs. 66-1221 to 66-1245.

66-1221. Purpose. In order to safeguard life and health (a) any person practicing or offering to practice professional nursing in this state for compensation or personal gain, shall be required to submit evidence that he or she is qualified so to practice, and shall be licensed as hereinafter provided: and.

In order to safeguard life and health (b) any person practicing or offering to practice practical nursing in this state as a certified or licensed practical nurse, shall be required to submit evidence that he or she is qualified so to practice, and shall be licensed as hereinafter provided.

After January 1, 1954, it shall be unlawful for any person to use any title, abbreviation, sign, card, or device to indicate that such person is (a) a registered or professional nurse (b) a certified or licensed practical nurse unless such person has been duly licensed under the provisions of this act, and the license of such person shall be valid and in force in compliance with the provisions of this act.

History: En. Sec. 1, Ch. 243, L. 1953. NOTE.—Earlier legislation relating to registration of nurses was Sees. 3203 to 3216, R. C. M. 1935 and Sees. 1 to 3, 3a to 3d, 4a to 4e, 5, 6, 7a, 7b, 8a, 8b, 9, 10 of Ch. 253, Laws 1947.

Cross-References

Exemption of nurses from jury duty, sec. 93-1304.

Liens of nurses on certain claims for injuries, sec. 45-1201.

Collateral References

Licenses € 11(1).

53 C.J.S. Licenses § 30. 41 Am. Jur. 144, Physicians and Surgeons, § 14.

66-1222. Citation of act—definition of board—identification of board when administering act for professional nursing and for practical nursing —definition of terms. This act may be cited as the Montana Nursing Practice Act.

The use of the feminine gender shall include the masculine gender and vice versa.

As used in this act the term or word "board" means the Montana state board of nursing created by this act, with dual functions (a) in the field of professional nursing and (b) in the field of practical nursing, and irrespective of the number or members of the board when functioning in either of said fields. In all matters relating to "professional nursing" the board shall consist of five (5) members to be qualified and appointed as hereinafter provided. In all matters relating to "practical nursing" the board shall consist of eight (8) members, five (5) of whom shall be identical with the five (5) member board, and the remaining three (3) members

to be qualified and appointed as hereinafter provided. The board of five (5) members may for convenience be referred to as the Montana state board of nursing followed by the words "professional nursing administration," and the board of eight (8) members may, for convenience, be referred to as the Montana state board of nursing, followed by the words "practical nursing administration."

The practice of nursing embraces two classes of nursing service and activity, defined, respectively, as follows:

- (1) A person practices professional nursing who for compensation or personal gain, performs any professional nursing services requiring the application of principles of the biological, physical or social sciences and nursing skills in the care of the sick, in the prevention of disease or in the conservation of health.
- (2) A person practices practical nursing who for compensation or personal gain cares for selected convalescent, subacutely and chronically ill patients, and who assists the professional nurse in a team relationship, especially in the care of those more acutely ill. She provides nursing service in institutions, and in private homes where she is prepared to give household assistance when necessary. She may be employed by a private individual, a hospital or a health agency. The practical nurse works under the direct supervision of a registered nurse where such supervision is possible and obtainable, and similarly, under the direct supervision of a physician.

History: En. Sec. 2, Ch. 243, L. 1953.

66-1223. Creation of the Montana state board of nursing—dual functions-addition of practical nurses to membership of board when functioning in field of practical nursing-appointment-term of office-removal of members from office-seal-board records public-legal counsel. There is hereby created a licensing, administrative and supervisory board to function in the field of professional nursing and, also, in the field of practical nursing, which board shall be known as the Montana State Board of Nursing, subject to the further identification for each administrative field as in section 66-1222 above provided. The governor shall appoint a board consisting of five (5) registered professional nurses, which shall be and constitute the Montana state board of nursing-professional nursing administration. The said board, together with three (3) practical nurses who shall be appointed by the governor from the field of practical nursing as herein provided, shall constitute the Montana state board of nursing—practical nursing administration. The term of appointment as a member of the board, whether exercising functions in the field of professional nursing (five-member board), or in the field of practical nursing (eight-member board), shall be five (5) years, and no person shall be appointed for more than two (2) consecutive terms, Any appointment to fill any vacancy shall be for the unexpired portion of the term. Within thirty days after this act becomes effective the governor shall appoint five (5) registered professional nurses, who shall constitute the Montana state board of nursing—professional nursing administration. One of the five original appointments of registered professional nurses shall be for five NURSING 66-1224

(5) years, one shall be for four (4) years, one shall be for three (3) years, one shall be for two (2) years, and one shall be for one (1) year. Within thirty days after this act becomes effective the governor shall appoint three (3) practical nurse members to the board of practical nursing administration. One of the three original appointments of practical nurses shall be for five (5) years, one shall be for three (3) years, and one shall be for one (1) year.

The governor may remove any member from the board, however constituted, for neglect of any duty required by law or for incompetency or unprofessional or dishonorable conduct, but none of the powers above enumerated shall be exercised unless the member shall have been first served with verified charges in writing, such charges heard at public hearing before the board under its appropriate administration, whereat the person charged may be represented by counsel, on not less than twenty (20) days' notice of such hearing; the decision of the board shall be stated in writing and filed with the secretary, and a true, signed copy thereof served upon the person charged. The decision of the board shall be subject to judicial review both on the facts and the law, by writ of review (certiorari) in the appropriate district court on the whole record in the matter including the record before the board and the governor.

The board shall have a seal which shall be used to authenticate its acts as said board, under each administration. The seal shall have inscribed thereon the words "Montana State Board of Nursing"—"Official Seal" and such device or legend as may be designated by the board.

The records and files of the board shall at all times be open to public inspection.

The attorney general of the state of Montana shall be, ex officio, the duly authorized attorney and legal counsel for the board; but the board may, with the approval of the attorney general, appoint additional legal counsel to assist it in the administration and enforcement of the within act, as may be necessary or advisable.

History: En. Sec. 3, Ch. 243, L. 1953.

66-1224. Qualifications of members of board in the respective administrations of professional and practical nursing. Each professional nurse member of the board shall:

- (1) Be a citizen of the United States;
- (2) Be a resident of this state for at least one (1) year prior to appointment;
 - (3) Have graduated from an approved school of nursing;
 - (4) Be licensed as a registered nurse in this state;
- (5) Have had at least five (5) years' experience in nursing following graduation. At least three (3) members shall have had at least three (3) years in administrative, teaching, or supervisory experience in schools of nursing:
- (6) Have been actively engaged in nursing for at least three (3) years immediately prior to appointment or reappointment.

Each practical nurse member of the board shall:

(1) Be a citizen of the United States;

- (2) Be a resident of this state for at least one (1) year prior to appointment;
- (3) After July 1, 1957, shall be a graduate of a school of practical nursing;
 - (4) Be licensed as a practical nurse in this state;
- (5) Have had at least three (3) years' experience as a practical nurse and have been actively engaged in the practice of practical nursing for at least two (2) years immediately prior to appointment or reappointment;

Each original appointee for the practical nursing administration shall meet all the qualifications necessary for appointment, with the exception of being licensed as a practical nurse in this state and graduation from a school of practical nursing.

Each member of the board, however constituted, shall subscribe and file with the secretary of state the constitutional oath of office before beginning the term of office.

History: En. Sec. 4, Ch. 243, L. 1953.

Organization—duties and powers—separation of records responsive to functions of board—dual administrations to be exclusive of each other. The Montana state board of nursing, inclusive of the practical nursing administration, shall meet annually in the month of July in each year and shall elect from among the eight (8) members a president and a secretary, each of whom shall be a professional nurse, and such board shall also appoint and employ an executive secretary, qualified as hereinafter provided, who shall not be a member of the board. The Montana state board of nursing, inclusive of the practical nursing administration, shall hold such other meetings during the year as may be deemed necessarv to transact its business. The Montana state board of nursing-professional nursing administration, shall meet annually in July of each year, and shall hold such other meetings during the year as may be deemed necessary to transact its business. A majority of the board, as separately constituted for each administration, including in such majority at least one officer of the board, shall constitute a quorum at any meeting, provided that when sitting as the practical nursing administration, a quorum shall consist of a minimum of two (2) practical nurse members and three (3) professional nurse members, including one board officer. The Montana state board of nursing, convened and acting from time to time under its separate administrations, shall keep separate and complete minutes and records of the respective administration meetings and of the rules, regulations and orders promulgated by each administration, and each administration shall exercise its functions and powers and carry out its duties exclusive of the other, except for the identity and membership as in this act provided.

The board under each administration is authorized to adopt, and from time to time revise such rules and regulations, not inconsistent with law, and within the subject matter delegated to each administration by this act, as may be necessary to enable the respective administrations to carry into effect the provisions of this act, as delegated to each. The board under each nursing administration shall prescribe such curricula and

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standards for schools and courses preparing persons for registration and licensure under this act. It shall provide for surveys of such schools and courses at such times as it may deem necessary. It shall approve such schools and courses as meet the requirements of this act and of the board. It shall evaluate and approve courses for affiliation of student nurses. Under each administration the board shall examine, license and renew licenses of duly qualified applicants. It shall conduct hearings upon charges calling for discipline of a licensee or revocation of license or removal of schools of nursing from the approved list. It shall have power to issue subpoenas, and compel the attendance of witnesses, and administer oaths to persons giving testimony at hearings. It shall cause the prosecution of all persons violating this act and have power to incur necessary expenses therefor.

The board under each administration shall have power to adopt and publish such forms for use by applicants and others, including license, certificate and identity forms, and other appropriate forms and publications as may be convenient for the proper administration of this act, and shall have the power to fix reasonable fees for incidental services, all within the subject matter delegated to each administration by this act. All such forms shall make clear reference to the administration for which the form is intended.

The board, inclusive of the practical nursing administration, shall appoint and employ one qualified person to serve as executive secretary to the board, including the practical nursing administration, and it shall fix the compensation and define the duties of such employment. It may employ such other persons as may be necessary to carry on the work of the board, under each administration.

The executive secretary to be appointed shall be a citizen of the United States, a graduate of an approved school of nursing and of a college or university. She shall be a registered nurse with at least five (5) years' experience in teaching or administration, or both, in a school of nursing approved by the board.

Except as otherwise required by the content of the language used, the powers and duties enumerated in this act shall be exercised and performed by the Montana state board of nursing—professional nursing administration, in all matters relating to professional nurses or professional nursing education, and shall be exercised and performed by the said board inclusive of the practical nursing administration in all matters relating to practical nurses and practical nursing education. The officers, appointees and employees of the Montana state board of nursing shall also be the officers, appointees and employees of the board inclusive of the practical nursing administration.

History: En. Sec. 5, Ch. 243, L. 1953.

66-1226. Reimbursement for expenses—compensation. Each member of the Montana state board of nursing, however constituted, shall be paid hotel, travel and other necessary expenses, and shall be paid, in addition, fifteen dollars (\$15.00) per day for each day actually engaged in the discharge of duties under this act, including all the time spent in actual

attendance at any meeting of the board, however constituted, and in direct travel to and from such meetings, and a reasonable number of days for the preparation and administration of examinations.

History: En. Sec. 6, Ch. 243, L. 1953.

- 66-1227. Qualifications of applicants for license to practice professional nursing. An applicant for a license to practice as a registered professional nurse shall submit to the board, acting under the professional nursing administration, written evidence, verified by oath, that said applicant:
- (1) Has successfully completed at least an approved four year high school course of study or the equivalent thereof as determined by the department of public instruction;
- (2) Has completed the basic professional curriculum in an approved school of nursing and holds a diploma therefrom;
- (3) Shall meet such other qualification requirements as the board may prescribe.

History: En. Sec. 7, Ch. 243, L. 1953.

- 66-1228. License—by examination—by endorsement without examination—license fees. (1) By examination. The applicant for license to practice professional nursing shall be required to pass a written examination in such subjects as the board, acting under the professional nursing administration, may determine. Each written examination may be supplemented by an oral or practical examination. Upon successfully passing such examination, the board shall issue to the applicant a license to practice nursing as a registered professional nurse. The applicant shall pay a fee of twenty-five (\$25.00) dollars at the time the application is submitted, which fee shall be returned to the applicant, if the application is withdrawn not later than five (5) days prior to the date of examination, or, if the examination is not taken, subject to deduction by the board of one dollar (\$1.00) per subject of the examination which shall be retained by the board.
- (2) By endorsement without examination. (a) The board, acting under the professional nursing administration, may issue a license to practice nursing as a registered professional nurse without examination, to an applicant who has been duly licensed as a registered professional nurse under the laws of another state, territory or country, if in the opinion of the board the applicant meets the qualifications required of registered nurses in this state at the time the applicant graduated from a school of nursing. The applicant shall pay a fee of twenty dollars (\$20.00) at the time the application is submitted, which fee shall be returned to the applicant if the application is withdrawn not later than five (5) days prior to final submission of the application to the board, subject to deduction of five dollars (\$5.00), to be retained by the board.
- (b) An applicant may, pending application for a professional nursing license pursuant to paragraph (a) immediately preceding practice professional nursing as an employee of a physician in her capacity as professional nurse or in a hospital or public health agency for a period not longer than six (6) months from the date the board acknowledges receiving from such nurse a duly completed statement, on a form provided by the board,

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of intention so to practice. Such statement shall consist of (1) an affidavit by such nurse and (2) an affidavit by the physician employer or by the administrator, assistant administrator, or director of nursing of a hospital or public health agency where such nurse intends to practice professional nursing. The affidavit of such nurse and the affidavit of such physician employer or administrator, assistant administrator or director of nursing of such hospital or public health agency shall contain the information deemed by the board to be necessary for such statement. This paragraph shall not be construed to permit such nurse to practice for more than said six (6) months period, or, in any event, after being notified by the board that application for a license has been denied, or, in all cases, after being notified by the board to cease and desist such practice; notice in all cases shall be given by registered mail to the address of applicant as the same appears in the statement of applicant.

History: En. Sec. 8, Ch. 243, L. 1953. Collateral References

Degree of care and skill required of a nurse. 51 ALR 2d 972.

66-1229. Title and abbreviation of registered nurse. Any person who holds a valid license to practice as a registered professional nurse in this state shall have the right to use the title "Registered Nurse" and the abbreviation "R.N."

History: En. Sec. 9, Ch. 243, L. 1953.

66-1230. Nurses registered under previous law deemed licensed hereunder. Any person holding a valid Montana license or certificate to practice nursing as a registered nurse under previous Montana law shall be deemed licensed as a registered nurse under the within act, for the unexpired portion of the license period appearing on such prior license, subject to payment of fees, and renewal fees, to effect renewal and continue such license valid and operative, under the provisions of the within act.

History: En. Sec. 10, Ch. 243, L. 1953.

- 66-1231. Qualifications of applicants for licensed practical nurse. An applicant for a license to practice as a licensed practical nurse shall submit to the board acting under the practical nursing administration written evidence, verified by oath, that the applicant:
- (1) Has completed at least two (2) years of high school, or its equivalent, and such other preliminary qualification requirements as the practical nursing administration may prescribe;
- (2) Has successfully completed the prescribed curriculum in an approved school of practical nursing and holds a diploma or certificate therefrom, provided that any person who has completed the prescribed course in any recognized school for practical nursing within the state of Montana prior to the effective date of this act, shall be considered to have met this requirement;
- (3) Shall meet such other qualification requirements as the board, acting under the practical nursing administration, may prescribe.

History: En. Sec. 11, Ch. 243, L. 1953.

- 66-1232. License of practical nurse by examination—by endorsement without examination. (1) By examination. The applicant for license to practice as a practical nurse shall be required to pass a written examination in such subjects as the board, acting under the practical nursing administration, may determine. Each written examination may be supplemented by an oral or practical examination. Upon successfully passing such examination the Montana state board of nursing—practical nursing administration, shall issue to the applicant a license to practice as a licensed practical nurse.
- (2) By endorsement—without examination. The Montana state board of nursing—practical nursing administration, may issue a license to practice as a licensed practical nurse without examination to any applicant who has been duly licensed or registered as a licensed practical nurse or person entitled to perform like services under a different title under the laws of another state, territory or country, if in the opinion of the practical nursing administration the applicant meets the requirements for practical nurses in this state.

History: En. Sec. 12, Ch. 243, L. 1953.

66-1233. Waiver of certain requirements for licensing practical nurses before July 1, 1955. All applications for license under this waiver section of the within act must be made and delivered to the board before July 1, 1955.

The Montana state board of nursing, practical nursing administration, may issue a license to practice as a licensed practical nurse to any person who shall submit written evidence, verified by oath, that said applicant:

- (1) Is at least twenty (20) years of age;
- (2) Is of good moral character;
- (3) Is in good health;
- (4) Has lived in and cared for the sick in this state for two out of the three years immediately prior to July 1, 1953.

The application must be endorsed by written statements verified by oath of (a) two doctors of medicine licensed in Montana, or (b) a doctor of medicine licensed in Montana and a registered professional nurse director of nursing of any licensed hospital within the state of Montana, which endorsers must have personal knowledge of the applicant's qualifications.

The applicant shall be required to pass a written examination in such subjects as the board—practical nursing administration, may determine. Each examination may be supplemented by an oral or practical examination.

History: En. Sec. 13, Ch. 243, L. 1953.

66-1234. Fee. The applicant applying for a license to practice as a licensed practical nurse shall pay a fee of fifteen dollars (\$15.00) to the board at the time the application is submitted, which fee shall be returned to the applicant if the application is withdrawn not later than five (5) days prior to date of examination or the final submission to the board of application for endorsement without examination, subject to a deduction of five dollars (\$5.00) to be retained by the board.

History: En. Sec. 14, Ch. 243, L. 1953.

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66-1235. Title and abbreviation of licensed practical nurse. Any person who holds a valid license to practice as a licensed practical nurse in this state shall have the right to use the title "Licensed Practical Nurse" and the abbreviation "L.P.N."

History: En. Sec. 15, Ch. 243, L. 1953.

66-1236. Renewal of license. The license of every person licensed under the provisions of the act, either as a registered nurse, or a licensed practical nurse, must be annually renewed, except as hereinafter provided. On or before December first of each year, the board shall mail an application form for renewal of license to every person to whom a license was issued or renewed during such year. The applicant shall carefully complete and subscribe the application form and return it to the board with a renewal fee of two dollars (\$2.00) before January first, next. Upon receipt of the application and fee the board shall verify the accuracy of the application against its record, and from such other sources as it deems reliable, and issue to the applicant a certificate of renewal for the current year beginning January first and expiring December thirty-first, following. Such certificate of renewal shall render the holder thereof a legal practitioner of nursing for the period stated in the certificate of renewal.

Any licensee who allows her license to lapse by failing to renew the license as provided above may be reinstated by the board upon satisfactory explanation for such a failure to renew license and on payment of the current renewal fee prescribed by the board.

Any person practicing nursing during any time following the date her license has expired by lapse of time shall be considered an illegal practitioner and shall be subject to the penalties provided for violations of this act.

History: En. Sec. 16, Ch. 243, L. 1953.

66-1237. Fund—administration and use—transfer of funds from Montana state board of nurse examiners. There is hereby created the fund of the Montana state board of nursing. The state treasurer of the state of Montana shall be custodian of said fund and shall keep full, detailed account of all receipts, accruals and disbursements of the same. Disbursements from the fund shall be effected by warrants drawn by the state auditor on the fund, pursuant to claims authorized and approved by (a) the Montana state board of nursing, and (b) approved by the Montana state board of nursing, and all fines collected under this act shall be paid over by the executive secretary to the state treasurer for the credit of said fund, as required by law.

All amounts paid into this fund shall be held subject to the order of the Montana state board of nursing to be used for the purposes of meeting necessary expenses incurred in the administration of this act, and the performance of the multiple functions of the board under each administration.

All funds which may have accumulated to the credit of the Montana state board of nurse examiners under chapter 12, Title "Nursing," section 66-1201 through 66-1220, Revised Codes of Montana, 1947, shall, at the

effective date of this act be transferred by the state treasurer to the credit of the Montana state board of nursing created by the within act, and shall be available and expendable for the multiple functions of said board and expended by the board in the administration of this act.

History: En. Sec. 17, Ch. 243, L. 1953.

NOTE.—Sections 66-1201 through 66-1220, referred to above, were repealed by Sec. 27, Ch. 243, Laws 1953.

- 66-1238. Schools of nursing—application for approval. An institution desiring to conduct a school of professional or practical nursing shall apply to the board under the appropriate administration, and submit evidence that:
- (1) It is prepared to carry out the prescribed basic professional nursing curriculum or the prescribed curriculum for practical nursing, as the case may be;
- (2) It is prepared to meet other standards established by this law and by the Montana state board of nursing.

History: En. Sec. 18, Ch. 243, L. 1953.

66-1239. Survey and approval. A survey of the institution or institutions with which the school is to be affiliated shall be made by the executive secretary or other authorized employee of the board, who shall submit a detailed written report of the survey to the board. If, in the opinion of the board, the requirements for an approved school of nursing (professional or practical) are met, it shall approve the school as an approved school of nursing.

When the board determines that any approved school of nursing is not maintaining the standards required by the statutes and by the board, notice thereof in writing specifying the defect or defects shall be immediately given to the school. A school which fails to correct these conditions to the satisfaction of the board within a reasonable time shall be removed from the list of approved schools of nursing.

History: En. Sec. 19, Ch. 243, L. 1953.

- 66-1240. Grounds for discipline. The board, acting under the appropriate administration, shall have power to deny any license applied for, or to revoke or suspend any license to practice nursing issued by the board, or to discipline a licensee upon proof that the person:
- (1) Is guilty of fraud or deceit in procuring or attempting to procure a license to practice nursing;
 - (2) Is guilty of a crime or gross immorality;
- (3) Is unfit or incompetent by reason of negligence, habit or other causes;
- (4) Is habitually intemperate or is addicted to the use of habit-forming drugs:
 - (5) Is mentally or physically incompetent;
 - (6) Is guilty of unprofessional conduct:
- (7) Has willfully or repeatedly violated any of the provisions of this act; but only after compliance with the provisions of section 66-1241, with

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respect to written, verified complaint, notice of hearing, and personal service of complaint and notice on the person charged, and public hearing before the proper board.

History: En. Sec. 20, Ch. 243, L. 1953.

66-1241. Disciplinary proceedings. Upon filing of a sworn complaint, in writing, with the board, charging a person with violation of any one or more of the provisions specified in the preceding section as a ground for disciplinary action, the executive secretary of the board shall fix a time and place for a public hearing before the board to be convened in membership as the five-member board for professional nurses, or as the eight-member board for practical nurses, dependent upon the professional or practical status of the licensee, nurse or person against whom complaint is made, and shall cause a copy of the charges, together with a notice of the time and place, fixed for the hearing, to be served on the person charged at least twenty (20) days prior thereto.

The attendance of witnesses and the production of books, papers and documents at the hearing may be compelled by subpoenas issued by the board on its own motion, or at the request of the complainant or the person charged (accused), which shall be served in accordance with law. At the hearing any member of the board, or its executive secretary, shall administer oaths as may be necessary for the proper conduct of the hearing.

At the hearing the person charged shall have the right to appear either personally or by counsel, or both, to produce witnesses and evidence on his or her own behalf, to cross-examine witnesses and to have subpoenas issued by the board. If the person charged is found guilty of the charges the board may refuse to issue a license to the applicant or may revoke or suspend a license, issued to a licensee. The decision of the board shall be in writing, set out the charges, summarize the evidence and contain the findings of fact and the decision and order of the board. In all cases where the person charged is a practical nurse, the board shall sit as the practical nursing administration. The evidence shall be examined and weighed by application of the rules of evidence in civil actions.

A revoked or suspended license may be reissued after one year, in the discretion of the board.

Any decision of the board under this section shall be subject to judicial review upon the whole record before the board, on both the fact and the law, by writ of review (certiorari).

History: En. Sec. 21, Ch. 243, L. 1953.

66-1242. Exemption of persons from act—when and under what circumstances. No provision of this law shall be construed as prohibiting gratuitous nursing by friends or members of the family, or as prohibiting the incidental care of the sick by domestic servants or persons primarily employed as housekeepers; or as prohibiting nursing assistance in the case of an emergency; nor shall it be construed as prohibiting the practice of nursing by students enrolled in approved schools of nursing or approved courses; nor by the graduates of such schools or courses pending the results of the first licensing examination scheduled by the board following

such graduation; nor shall it be construed as prohibiting the practice of nursing in this state by any legally qualified nurse of another state whose engagement requires her to accompany and care for a patient temporarily residing in this state during the period of one such engagement, not to exceed six (6) months in length, provided such person does not represent or hold herself to be a nurse licensed to practice in this state; nor shall it be construed as prohibiting the practice of any legally qualified nurse of another state who is employed by the United States government or any bureau, division or agency thereof, while in the discharge of her official duties.

Nothing in this act shall be construed as prohibiting nursing or care of the sick, with or without compensation, when done in connection with the practice of the religious tenets of any well-established religion or denomination by adherents thereof; nor shall this act prohibit the practice of practical nursing for hire or otherwise by any person, provided that such person shall not use in connection with her name any designation tending to imply that she is a licensed practical nurse unless then duly licensed so to practice under this act.

This act shall not be construed as conferring any authority to practice (a) medicine or (b) surgery, or (c) any combination thereof, or (d) to confer any authority to practice any of the healing arts prescribed by law to be practiced in the state of Montana, nor (e) to permit any person to undertake the treatment of disease by any of the methods employed in such arts, unless the licensee shall have qualified under the applicable law or laws licensing the practice of such profession(s) or healing art(s) in the state of Montana.

History: En. Sec. 22, Ch. 243, L. 1953.

- 66-1243. Violation of act—penalties. It shall be a misdemeanor for any person (including any corporation, association or individual) to:
- (1) Sell or fraudulently obtain or furnish any nursing diploma, license or record or aid or abet therein;
- (2) Practice nursing as defined by this act under cover of any diploma, license or record illegally or fraudulently obtained or signed or issued unlawfully or under fraudulent representation;
- (3) Practice professional nursing as defined by this act unless duly licensed to do so under the provisions of this act;
- (4) Use in connection with her name any designation tending to imply that she is a registered professional nurse or a licensed practical nurse unless duly licensed so to practice under provisions of this act;
- (5) Practice nursing during the time her license issued under the provisions of this act shall be suspended, revoked or on inactive status;
- (6) Conduct a school of nursing or a course unless the school or course has been approved by the board;
 - (7) Otherwise violate any provisions of this act.

Such misdemeanor shall be punishable by a fine of not less than one hundred dollars (\$100.00) for the first offense. Each subsequent offense

shall be punishable by a fine of three hundred dollars (\$300.00), or by imprisonment of not more than six (6) months in the county jail, or by both such fine and imprisonment.

The several district courts within their respective county jurisdictions are hereby empowered to hear, try and determine such misdemeanor and to impose in full the punishment and fines herein prescribed. It shall be necessary to prove, in any prosecution for misdemeanor under this section. only a single act prohibited by law, or a single holding out, or an attempt without proving a general course of conduct in order to constitute a violation.

History: En. Sec. 23, Ch. 243, L. 1953.

66-1244. Injunctions. When it appears to the board that any person is violating any of the provisions of this act, the board may, in its own name, bring an action in a court of competent jurisdiction for an injunction against such violation, and the proper courts of this state may enjoin any person, firm or corporation from violation of this act without regard to whether proceedings have been or may be instituted before the board, or whether criminal proceedings have been or may be instituted.

History: En. Sec. 24, Ch. 243, L. 1953.

66-1245. Co-ordination with preceding board—transfer of records and funds to board created by the within act. The board created hereby shall succeed to and receive from the board functioning prior to the passage of the within act all its records, books, papers, accounts, moneys and unfinished business and shall complete the business of said predecessor board in accordance with the provisions of this act. Said predecessor board shall deliver to the board created hereby all of said records and funds on July first, 1953, whereupon the existing Montana state board of nurse examiners and all authority vested by law in such existing board shall wholly cease and terminate.

History: En. Sec. 26, Ch. 243, L. 1953.

CHAPTER 13

OPTOMETRY-REGULATION

Section 66-1301. Practice of optometry defined. 66-1302. Provisions regulating practice of optometry. Examiners in optometry. 66-1303. Officers of board-meetings. 66-1304. 66-1305. Examinations—admission to practice—nonresidents. 66-1306. Certificate to issue to persons now engaged in practice. 66-1307. Renewal of registration—revocation—fees. 66-1308. Registration of certificate in county. Failure to apply for certificate—forfeiture of right. 66-1309. Certificate to be displayed in office. 66-1310. 66-1311. Compensation of examiners-report. 66-1312. Revocation of certificate for cause. Second revocation. 66-1313. 66-1314. Penalty for violations. Jurisdiction of justices of the peace.
Act not to apply to physicians and surgeons.
Public agencies—discrimination prohibited. 66-1315.

66-1316.

- **66-1301.** (3155) **Practice of optometry defined.** The practice of optometry is the profession constituting the art and science of visual care and is hereby defined to be any one of the following acts:
- 1. The optometric examination or optometric diagnosis of all of those physiological or anatomical parts or functions which consummate the process of human vision to ascertain the presence therein of abnormal conditions or functions which may be optometrically diagnosed, corrected, remedied or relieved.
- 2. The employment of any optometric means, excluding the use of drugs or surgery, for the purpose of detecting any condition of the process of vision, or the effects of any condition of the process of vision, which may have any significance in a complete optometric diagnosis.
- 3. The application or prescription of ophthalmic lenses, contact lenses, prisms, orthoptics, visual training, any physical, mechanical, or physiological therapy, and the furnishing or application of any prosthetic or therapeutic devices for the correction or relief of visual anomalies excluding the use of drugs or surgery.

History: En. Ch. 138, L. 1907; re-en. Sec. 1607, Rev. C. 1907; re-en. Sec. 3155, R. C. M. 1921; amd. Sec. 1, Ch. 252, L. 1959.

Police Regulation

The practice of optometry is a proper subject for police regulation. Johnson v. City of Great Falls, 38 M 369, 374, 99 P 1059.

Collateral References

Physicians and Surgeons 3 et seq. 70 C.J.S. Physicians and Surgeons 1. 41 Am. Jur. 158, Physicians and Surgeons, 28.

One who fills prescription under reciprocal arrangement with optometrist as subject to charge of practice of optometry without license. 121 ALR 1455.

- **66-1302.** (3156) **Provisions regulating practice of optometry.** It shall be unlawful for any person:
- 1. To practice optometry in the state of Montana unless he shall first have obtained a certificate of registration, in the manner hereinafter provided, and filed the same or a certified copy thereof with the county clerk and recorder of the county of his residence, excepting such persons who at the present time are regularly registered optometrists and possess a valid, unrevoked certificate of registration; or
- 2. To sell or barter, or offer to sell or barter any certificate of registration issued by the state board of optometry; or
- 3. To purchase or procure by barter any such certificate of registration with intent to use the same as evidence of the holder's qualification to practice optometry; or
- 4. To alter with fraudulent intent in any material regard such certificate of registration; or
- 5. To use or attempt to use any such certificate of registration which has been purchased, fraudulently issued, counterfeited or materially altered as a valid certificate of registration; or
 - 6. To practice optometry under a false or assumed name; or
- 7. To willfully make any false statement in a material regard in any application for an examination before the state board of optometry or for a certificate of registration; or

- 8. To advertise by displaying a sign or by otherwise holding himself out to be an optometrist without having at the time of so doing a valid unrevoked certificate of registration; or
- 9. To replace or duplicate ophthalmic lenses with or without a prescription or to dispense ophthalmic lenses from prescriptions, without having at the time of so doing a valid, unrevoked certificate of registration as an optometrist; provided, however, that the provisions hereof shall not be construed so as to prevent an optical mechanic from doing the merely mechanical work on an ophthalmic lens which is ordered on a prescription signed by a duly licensed optometrist and is dispensed only by said optometrist or a person employed by said optometrist and who does so in the office of and under the direct personal supervision of an optometrist; or
- 10. To take or make any measurements for the purpose of fitting or adapting ophthalmic lenses to the human eye, without having at the time of so doing a valid, unrevoked certificate of registration; and any person who shall take or make any measurements or use any mechanical device whatsoever for such purpose or who shall in the sale of spectacles or eyeglasses or lenses use, in the testing of the eyes therefor, lenses other than the lenses actually sold, shall be deemed to be practicing optometry within the meaning thereof; provided, that nothing in this section shall apply to the prescriptions of qualified optometrists when sent to a recognized optical laboratory.
- 11. To advertise at a price, or any stated terms of such a price, or as being free, any of the following: The examination or treatment of the eyes; the furnishing of optometrical services, or the furnishing of a lens, lenses, contact lens, contact lenses, glasses, or the frames or fitting thereof.

The provision of this subdivision does not apply to the advertising of goggles, sunglasses, colored glasses, or occupational eye protective devices, provided the same are so made as not to have refractive values and are not advertised in connection with the practice of optometry or of any professional service.

12. To adapt any lens to direct contiguous contact to the human eyeball without having at the time of so doing a valid, unrevoked certificate as an optometrist.

History: En. Ch. 138, L. 1907; re-en. Sec. 1608, Rev. C. 1907; re-en. Sec. 3156, R. C. M. 1921; amd. Sec. 1, Ch. 171, L. 1925; amd. Sec. 1, Ch. 130, L. 1939; amd. Sec. 2, Ch. 252, L. 1959.

Collateral References
Physicians and Surgeons 10.

70 C.J.S. Physicians and Surgeons § 31.

66-1303. (3157) Examiners in optometry. A board is hereby created to be known as the Montana state board of examiners in optometry, hereinafter designated the board of examiners, which shall consist of three members appointed by the governor. The board shall have power to make rules and regulations for the conduct, business and procedure of the board and for the regulation, conduct, supervision and procedure governing all applicants for certificates of registration as optometrists and the practice of optometry not inconsistent with the provisions of this act. No person shall be eligible

to appointment who is not a registered optometrist of the state of Montana and actually engaged in the exclusive practice of optometry in the state of Montana during the term of his office. Each of the members shall hold office for a term of six years or until his successor is appointed and qualified and shall be so classified that one member of said board shall retire every two years. The present members of the Montana state board of examiners in optometry shall continue to serve and act as members of the state board of optometry, but under the provisions of this act, during their respective terms or until their successors are appointed and qualified. The members of said board, before entering upon their duties, shall respectively take and subscribe to the oath required to be taken by other state officers, which shall be administered by the secretary of state, and filed in his office; and said board shall have a common seal. Appointments to fill vacancies caused by death, resignation or removal shall be made for the residue of such term by the governor.

History: En. Ch. 138, L. 1907; re-en. R. C. M. 1921; amd. Sec. 2, Ch. 171, L. Sec. 1609, Rev. C. 1907; re-en. Sec. 3157, 1925; amd. Sec. 2, Ch. 130, L. 1939.

66-1304. (3158) Officers of board—meetings. Said board shall choose at its first regular meeting, and annually thereafter, one of its members president and one secretary thereof, who severally shall have the power during their term of office to administer oaths and take affidavits, certifying thereto under their hands and the seal of the board. Said board shall meet at least once in each year at Helena, or some other place designated by the president, on the fourth Monday of July for the purpose of giving examinations in optometry, and in addition thereto, whenever, and wherever the president and secretary thereof shall call a meeting. The secretary of said board shall keep a full record of the proceedings of said board, which records shall at all reasonable times be open to public inspection.

History: En. Ch. 138, L. 1907; re-en. R. C. M. 1921; amd. Sec. 3, Ch. 171, L. Sec. 1610, Rev. C. 1907; re-en. Sec. 3158, 1925; amd. Sec. 1, Ch. 44, L. 1927.

66-1305. (3159) Examinations—admission to practice—nonresidents. The board of examiners shall make rules and regulations relative to and governing the qualifications of all applicants for certificates of registration as optometrists not inconsistent with the provisions of this act and if the applicant does not meet the requirements of such rules and regulations, then the applicant will not be eligible to take an examination to practice optometry in this state. If the applicant meets the requirements of such rules and regulations, said applicant, before beginning to practice optometry in this state, must pass an examination given by and conducted before said board of examiners. All examinations shall be practical in character and designated to ascertain the applicant's fitness to practice the profession of optometry and shall be conducted in the English language. The board shall, from time to time, publish and distribute the examination requirements for a certificate to practice optometry in the state of Montana. The board may accept the grades an applicant has received in the written examinations given by the national board of examiners in optometry.

- 2. No person shall be eligible to take said examination who is not 21 years of age, and who is not a citizen of the United States of America, and who is not of good moral character.
- 3. On and after July 1st, 1925, no person shall be eligible to take said examination unless he shall have certificates of graduation from an accredited high school and from a school of optometry wherein the practice and science of optometry is taught in a course of study covering eight semesters, or four years, of actual attendance and which school is accredited by the international association of boards of examiners in optometry. In lieu of said certificates of graduation an applicant for examination may, with like effect, furnish an affidavit that he has practiced optometry exclusively for a period of at least six years in some other state or states.
- 4. Every person desiring to be examined in optometry shall file an application in the manner prescribed by said board at least four weeks before the examination shall be held, and a fee of twenty-five dollars (\$25.00) shall accompany said application.
- 5. Every person successfully passing said examination shall be registered in the board register, which shall be kept by the secretary of said board, and upon the payment of a fee of ten dollars (\$10.00) shall receive a certificate of registration signed by the members of said board.
- 6. In case an applicant for a certificate of registration has been admitted to practice optometry in any state, and has secured an average of seventy-five per cent (75%) in his examination in such other state, he may, at the discretion of the said board, be granted a certificate to practice his profession in Montana, without examination, upon his payment of all fees, provided the state from which said applicant comes offers equal privileges to applicants for certificates of registration from this state.

History: En. Ch. 138, L. 1907; re-en. Sec. 1611, Rev. C. 1907; amd. Sec. 1, Ch. 128, L. 1917; re-en. Sec. 3159, R. C. M. 1921; amd. Sec. 4, Ch. 171, L. 1925; amd. Sec. 3, Ch. 130, L. 1939; amd. Sec. 3, Ch. 252, L. 1959.

Collateral References

Physicians and Surgeons 5(2). 70 C.J.S. Physicians and Surgeons § 12.

Validity of governmental regulation of optometry. 22 ALR 2d 939.

66-1306. (3160) Certificate to issue to persons now engaged in practice. Every person who is engaged in the practice of optometry in the state of Montana at the time of the passage of this act, shall, within three months thereafter, file an affidavit in proof thereof with said board, who shall make and keep a record of such persons, and shall, in consideration of the sum of five dollars, issue to him a certificate of registration.

History: En. Ch. 138, L. 1907; re-en. Sec. 1612, Rev. C. 1907; re-en. Sec. 3160, R. C. M. 1921.

66-1307. (3161) Renewal of registration — revocation — fees. Every registered optometrist who desires to continue the practice of optometry in this state shall annually on or before the second day of July of each year pay to the secretary of said board a renewal fee not to exceed the sum of twenty dollars (\$20.00) in return for which a renewal of registration shall be issued. The board may use not to exceed ten dollars (\$10.00)

from each renewal fee for the purpose of presenting to registered optometrists at least one annual educational program. If any person shall fail or neglect to procure his annual renewal of registration, his certificate of registration shall be revoked by said board; provided, however, that no certificate of registration shall be revoked without ninety days' notice having been given to the delinquent, who within such period shall have the right to the renewal of his certificate of registration on the payment of the renewal fee with a penalty of twenty-five dollars (\$25.00).

History: En. Ch. 138, L. 1907; re-en. Sec. 1613, Rev. C. 1907; amd. Sec. 2, Ch. 128, L. 1917; re-en. Sec. 3161, R. C. M. 1921; amd. Sec. $4\frac{1}{2}$, Ch. 171, L. 1925; amd. Sec. 4, Ch. 252, L. 1959.

Collateral References
Physicians and Surgeons 5.
70 C.J.S. Physicians and Surgeons § 20.

66-1308. (3162) Registration of certificate in county. Recipients of said certificate of registration shall present the same for record to the county clerk and recorder of the county in which they reside, and shall pay a fee of one dollar (\$1.00) to the county clerk and recorder for recording same. Said county clerk and recorder shall record said certificate in a book to be provided by him for that purpose. Any person so licensed, removing his residence from one county to another in this state, shall, before engaging in the practice of optometry in such other county, obtain from the county clerk and recorder of the county in which said certificate of registration is recorded a certified copy of such record, or else obtain a new certificate of registration from the board of examiners, and shall before commencing practice in such county, file the same for record with the county clerk and recorder of the county to which he removes, and pay the county clerk and recorder thereof, for recording the same, a fee of one dollar (\$1.00). Any failure, neglect, or refusal on the part of any person holding such certificate or copy of record to file the same for record, as hereinbefore provided, for six months after the issuance thereof, shall forfeit the same. Such board shall be entitled to a fee of one dollar (\$1.00) for the reissue of any certificate and the county clerk and recorder of any county shall be entitled to a fee of one dollar (\$1.00) for making and certifying the copy of the record of any such certificate.

History: En. Ch. 138, L. 1907; re-en. Sec. 1614, Rev. C. 1907; re-en. Sec. 3162, R. C. M. 1921; amd. Sec. 4, Ch. 130, L. 1939.

Collateral References
Physicians and Surgeons 5(1).
70 C.J.S. Physicians and Surgeons 23.

66-1309. (3163) Failure to apply for certificate—forfeiture of right. Any person entitled to a certificate, as provided for in section 66-1306, who shall not, within six months after the passage thereof, make written application to the board of examiners for a certificate of registration, accompanied by a written statement, signed by him, and duly verified before an officer authorized to administer oaths within this state, fully setting forth the grounds upon which he claims such certificate, shall be deemed to have waived his rights to a certificate under the provisions of said section. Any failure, neglect, or refusal on the part of any person holding such certificate

to file the same for record, as hereinbefore provided, for six months after the issuance thereof, shall forfeit the same.

History: En. Ch. 138, L. 1907; re-en. Sec. 1615, Rev. C. 1907; re-en. Sec. 3163, R. C. M. 1921.

66-1310. (3164) Certificate to be displayed in office. Every person to whom a certificate of examination or registration is granted shall display the same in a conspicuous part of his office wherein the practice of optometry is conducted.

History: En. Ch. 138, L. 1907; re-en. Sec. 1616, Rev. C. 1907; re-en. Sec. 3164, R. C. M. 1921.

Collateral References
Physicians and Surgeons 5.

70 C.J.S. Physicians and Surgeons § 3.

66-1311. (3165) Compensation of examiners—report. Out of the funds coming into the possession of said board, each member thereof may receive as compensation the sum of twenty-five dollars (\$25.00) and necessary expenses for each day actually engaged in the duties of his office. Such sums shall be paid from the fees received by said board under the provisions of this act, and no part of the salary or other expenses of the board shall ever be paid out of the state treasury. All moneys received in excess of said expenses, as above provided for, shall be held by the secretary as a special fund for meeting expenses of said board, and carrying out the provisions of this act, and he shall give such bonds as the board shall from time to time direct, and the secretary of said board shall make an annual report of its proceedings to the governor on the first Monday in January of each year, which report shall contain an account of all moneys received and disbursed by them pursuant to this act.

History: En. Ch. 138, L. 1907; re-en. R. C. M. 1921; amd. Sec. 5, Ch. 171, L. Sec. 1617, Rev. C. 1907; re-en. Sec. 3165, 1925; amd. Sec. 5, Ch. 252, L. 1959.

66-1312. (3166) Revocation of certificate for cause. Said board shall have the power to revoke any certificate of registration granted by it under this act for conviction of crime, habitual drunkenness, contagious or infectious disease, gross immorality, gross ignorance or inefficiency in his profession, or for unprofessional conduct. Unprofessional conduct shall mean: Obtaining any fee by fraud or misrepresentation; employing directly or indirectly any suspended or unlicensed optometrist to perform any work covered by this act; directly or indirectly accepting employment to practice optometry from any person not having a valid, unrevoked certificate of registration as an optometrist, or accepting employment to practice optometry from any company or corporation, or accepting employment to practice optometry for any company or corporation; permitting another to use his certificate of registration; soliciting or sending a solicitor from house to house; treatment or advice in which untruthful or improbable statements are made; professing to cure disease; advertising in which ambiguous or misleading statements are made; the use in advertising of the expression "eye specialist" or "specialist on eyes" in connection with the name of an optometrist; provided, that this act shall not prohibit legitimate or truthful advertising by any registered optometrist and provided that before any certificate shall be revoked, the holder thereof shall have notice in writing of the charge or charges against him, and, at a day specified in said notice, at least ten days after the service thereof, be given a public hearing, and have opportunity to produce testimony in his behalf, and to confront the witness against him. Any person whose certificate has been revoked may appeal to the courts or may after the expiration of ninety days apply to have the same regranted and the same shall be regranted him upon a satisfactory showing that the disqualification has ceased.

History: En. Ch. 138, L. 1907; re-en. Sec. 1618, Rev. C. 1907; amd. Sec. 3, Ch. 128, L. 1917; re-en. Sec. 3166, R. C. M. 1921; amd. Sec. 6, Ch. 171, L. 1925; amd. Sec. 5, Ch. 130, L. 1939.

Collateral References

Physicians and Surgeons 11.
70 C.J.S. Physicians and Surgeons § 16.

What amounts to conviction within statute making conviction ground for refusing or canceling license or special privilege. 113 ALR 1179.

66-1313. (3166.1) Second revocation. Any optometrist convicted a second time for violation of the provisions of this chapter or whose certificate of registration or examination has been revoked a second time shall not be permitted to practice optometry in this state.

History: En. Sec. 3166-A by Sec. 2, Ch. 44, L. 1927; re-en. Sec. 3166.1, R. C. M. 1935.

66-1314. (3167) Penalty for violations. Any person who shall violate any of the provisions of this act or the rules and regulations of the state board of examiners shall be decreed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than two hundred dollars (\$200.00) and not more than five hundred dollars (\$500.00), or by imprisonment in the county jail not exceeding six (6) months, or by both fine and imprisonment as the court may determine. All fines thus received shall be paid into the treasury of the board.

History: En. Ch. 138, L. 1907; re-en. Sec. 1619, Rev. C. 1907; re-en. Sec. 3167, R. C. M. 1921; amd. Sec. 8, Ch. 171, L. 1925; amd. Sec. 6, Ch. 130, L. 1939.

Collateral References

Physicians and Surgeons \$\infty 6(5), (10). 70 C.J.S. Physicians and Surgeons \§ 29.

66-1315. (3168) Jurisdiction of justices of the peace. Justices of the peace and the respective municipal courts shall have jurisdiction of violations of this act. It shall be the duty of the respective county attorneys to prosecute all violations of this act.

History: En. Ch. 138, L. 1907; re-en. Sec. 1620, Rev. C. 1907; re-en. Sec. 3168, R. C. M. 1921.

Collateral References

Physicians and Surgeons 3 et seq. 70 C.J.S. Physicians and Surgeons 24.

66-1316. (3169) Act not to apply to physicians and surgeons. Nothing in this act shall be construed to apply to physicians and surgeons authorized to practice under the laws of the state of Montana nor to an optician performing the required mechanical work under an order or prescription signed by a duly licensed physician or surgeon, nor to commissioned officers of the armed forces of the United States performing functions of this act in the line of their regular duty, nor to persons who

sell spectacles or eyeglasses without attempting to traffic upon assumed skill in adapting them to the eye.

History: En. Ch. 138, L. 1907; re-en. Sec. 1621, Rev. C. 1907; re-en. Sec. 3169, R. C. M. 1921; amd. Sec. 6, Ch. 252, L. 1959.

References

Johnson v. City of Great Falls, 38 M 369, 374, 99 P 1059; Swanz v. Clark, 71 M 385, 388, 229 P 1108.

66-1317. Public agencies—discrimination prohibited. All agencies of the state and its subdivisions administering relief, public assistance, public welfare assistance, social security health insurance or other health service under the laws of this state shall accept the services of licensed optometrists for any service, covered by their licenses, rendered to any person receiving benefits from said agents or bodies and shall pay for such services in the same manner as other ocular practitioners rendering similar services. None of the said governmental agencies or agents, officials or employees thereof, including the public schools, shall, in the performance of their duties, discriminate in any way among licensed ocular practitioners.

History: En. 66-1317 by Sec. 7, Ch. 252, L. 1959.

CHAPTER 14

OSTEOPATHY—REGULATION OF PRACTICE

Section 66-1401. Board of osteopathic examiners—appointment and term of office.

66-1402. Officers of board—certificates of qualification.

66-1403. Regulation osteopathic licenses, educational qualifications and renewal.

66-1404. Temporary certificates.

66-1405. Subjects of examination—appeal.

66-1406. Certificate does not authorize the practice of major or operative

66-1407. Record of license.

66-1408. Practice of osteopathy without license prohibited.

66-1409. Revocation of certificate.

66-1410. Compensation of board-report to governor.

66-1411. Graduates may be licensed without examination—practitioners from other states.

66-1412. Definition of term "practicing osteopathy."

66-1413. Osteopathy not practice of medicine.

66-1401. (3125) Board of osteopathic examiners—appointment and term of office. The governor of this state shall appoint a board as soon as possible after the passage of this act, to be known as the state board of osteopathic examiners. Said board shall consist of three qualified, practicing resident osteopaths, each of whom shall be a graduate of a legally authorized school of osteopathy; each member of said board shall serve thereon for a term of four years, and until his successor is appointed, except in cases of the first board, on which one shall serve for four years, one for three years, and one for two years, as specified in their appointment. In case of vacancy by death or otherwise, there shall be appointed in like manner a person to serve through such unexpired term.

History: The first board of osteopathic examiners was created by house bill No. 38, pp. 48 to 51, Laws of 1901.

This section en. by Ch. 51, L. 1905; reen. Sec. 1594, Rev. C. 1907; re-en. Sec. 3125, R. C. M. 1921.

Constitutionality

The practice of osteopathy is a proper subject for police regulation. Johnson v. City of Great Falls, 38 M 369, 374, 99 P 1059.

In a prosecution of a chiropractor for practicing osteopathy without a license, this statute was held not repugnant to the state constitution on the ground that there is nothing in the titles of the acts constituting the statute indicating an intention to include "chiropractic"; the latter, like the former, having to do with the art of healing by the use of the hands, falls within the definition of "osteopathy," and is therefore included within it. State v. Hopkins, 54 M 52, 56, 166 P 304.

The statute regulating the practice of osteopathy is not invalid as arbitrary and unreasonable class legislation, contrary to the fourteenth amendment to the federal constitution; neither does it make an arbitrary classification denying the right of citizens to engage in a lawful occupation, and is therefore not an abuse of the police power of the state. State v. Hopkins, 54 M 52, 59, 166 P 304.

References

State v. Dodd, 51 M 100, 105, 149 P 481; State v. Wood, 53 M 566, 569, 165 P 592; State v. Thierfelder, 114 M 104, 116, 132 P 2d 1035.

66-1402. (3126) Officers of board—certificates of qualification. board of osteopathic examiners shall elect a president, a secretary, and treasurer on the first Tuesday in March each year, from among their number, and shall have a common seal, and its president and secretary shall have power to administer oaths. Said board shall hold meetings for the examinations at the state capitol on the first Tuesday in March and September of each year, and such other meetings as may be deemed necessary. each session thereof not to exceed three days, and shall issue a certificate of qualification to all applicants having a diploma from a legalized, recognized, and regularly conducted school of osteopathy as such, at the time it was issued, or who pass required examinations as provided by section 66-1404. Said certificates shall be signed by the president and secretary of said board, and attested by its seal, and shall be conclusive of the right of the lawful holder thereof to practice osteopathy in this state. Said board shall keep a record of all proceedings; also a register of all applicants for a license, together with his or her name and age and time spent in the study and practice of osteopathy, and the name and location of the school or institute of osteopathy from which said applicant holds a diploma; and shall keep a register which shall show the names of all applicants licensed; and those who are rejected under this act. Said books shall be prima-facie evidence of all matters recorded therein.

History: En. Ch. 51, L. 1905; re-en. Sec. 1595, Rev. C. 1907; re-en. Sec. 3126, R. C. M. 1921.

Sufficiency of Proof to Support Violation

The record of the applicants for license, required by this section to be kept by the secretary of the board of osteopathic

examiners, showing that defendant had never applied for a license or a temporary certificate, was, in the absence of contradiction, sufficient to support the charge that he had been practicing without a license. State v. Hopkins, 54 M 52, 64, 166 P 304.

66-1403. (3127) Regulation osteopathic licenses, educational qualifications and renewal. (1) It shall be unlawful for any person to practice osteopathy in this state without a license from the board of osteopathic examiners. Any applicant applying for licensure shall be a person of good moral character. An applicant shall present evidence to the board that he has completed the following educational and professional requirements, (a) four years of high school or its scholastic equivalent; (b) at least two years preprofessional college education in an accredited college

or university, if the applicant matriculated in an osteopathic college after 1938; (c) four years professional education in an osteopathic college conforming to the minimum educational standards for osteopathic colleges established by the American osteopathic association and which is approved by the board. Application shall be made on forms furnished by the board. An applicant who fails the examination shall be entitled to a second examination without charge at the next succeeding meeting of the board.

- Each individual, after the first year of registration, holding a certificate to practice under this act and who is in active practice in this state, shall on or before the first day of April of each year pay a renewal fee of two dollars (\$2.00) to the secretary of the board of osteopathic examiners; and each individual, after the first year of registration, holding a certificate to practice under this act, who is not in active practice, shall on or before the first of April of each year pay a renewal fee of one dollar (\$1.00) to the secretary of the board. The secretary of the board shall before the 15th of March of each year send a notice to each individual holding a valid certificate to practice under this act and from whom a fee is due stating that such fee is due.
- (3) The certificate to practice under this act automatically becomes void when the renewal fee is not paid at the time named. Provided that the board may reinstate a practitioner whose certificate has lapsed upon the payment of all back renewal fees or upon the payment of ten dollars (\$10.00) if the lapsed fees exceed that amount.

History: En. Ch. 51, L. 1905; re-en. Sec. 1596, Rev. C. 1907; amd. Sec. 1, Ch. 124, L. 1919; re-en. Sec. 3127, R. C. M. 1921; amd. Sec. 1, Ch. 79, L. 1925; amd. Sec. 1, Ch. 108, L. 1953.

Collateral References Physicians and Surgeons 6.

70 C.J.S. Physicians and Surgeons §§ 10, 24.

41 Am. Jur. 155, Physicians and Surgeons, § 26.

Kind or character of treatment which may be given by one licensed as osteopath. 86 ALR 626.

66-1404. (3128) Temporary certificates. The secretary of the board of osteopathic examiners may upon examination, grant a certificate to an applicant to practice osteopathy until the next meeting of said board when he shall report the facts, at which time the temporary certificate shall expire, but such temporary certificate shall not be granted by the secretary of said board after the board has once rejected the applicant.

History: En. Ch. 51, L. 1905; re-en. Sec. 1597, Rev. C. 1907; re-en. Sec. 3128, R. C. M. 1921.

Operation and Effect

In a prosecution for practicing osteo-pathy without a license, the state is not required to negative the defendant's possession of the temporary certificate referred to in this section, this being a matter of defense. State v. Wood, 53 M 566, 569 et seq., 165 P 592; State v. Hopkins, 54 M 52, 64, 166 P 304. An information charging one with practicing osteopathy without first obtaining a license need not allege that he had procured a temporary certificate permitting him to practice, this being a matter of defense. State v. Hopkins, 54 M 52, 64, 166 P 304.

Collateral References

Physicians and Surgeons 14 et seq. 70 C.J.S. Physicians and Surgeons § 20.

66-1405. (3129) Subjects of examination—appeal. (1) All persons, after March 1, 1901, commencing the practice of osteopathy in this state, in any of its branches, shall apply to said board for a license to do so, and such applicant at the time and place designated by said board, shall submit to an examination in the following branches, to wit: anatomy, physiology, chemistry, pathology, bacteriology, gynecology, obstetrics, and theory and practice of osteopathy, and such other branches as are taught in well regulated and recognized schools of osteopathy and deemed advisable by said board and shall present evidence of having actually attended as required in section 66-1403 a legally authorized and regularly conducted school of osteopathy, recognized by said board of osteopathic examiners, except as otherwise provided in section 66-1402 of this code.

- (2) All examination papers on subjects peculiar to osteopathy shall be examined and their sufficiency passed upon by members of said board, whose decision shall be final thereon subject, however, to the right of appeal, which appeal shall be to the district court of the county in which the examination is held and said district court shall review such examination without a jury and shall have the right to take testimony thereon and the decision of such district court shall be also subject to the right of appeal to the supreme court by any persons aggrieved thereby, and upon such appeal the supreme court shall have the right to consider questions of both law and fact, and said board shall cause such examination to be scientific and practical, but of sufficient severity to test the candidate's fitness to practice osteopathy.
- (3) After examination the board shall grant a license to such applicants as shall pass the examination to practice osteopathy in the state of Montana, which license shall be granted by not less than two members of said board, attested by the seal thereof. For the support and maintenance of said board, the fee for such examination and license shall be twenty dollars (\$20.00), which shall be paid in advance to the secretary of said board to defray the expenses thereof.

History: En. Ch. 51, L. 1905; re-en. Sec. 1598, Rev. C. 1907; re-en. Sec. 3129, R. C. M. 1921; amd. Sec. 2, Ch. 108, L. 1953.

References

State v. Thierfelder, 114 M 104, 117, 132 P 2d 1035.

66-1406. (3130) Certificate does not authorize the practice of major or operative surgery. The certificate provided for in the preceding section shall not authorize the holder thereof to prescribe or use drugs in the practice of osteopathy, or to perform major or operative surgery; and any person holding a certificate under this act, who shall prescribe or use drugs in the practice of osteopathy, or who shall perform a major or operative surgery, shall be deemed guilty of a misdemeanor; provided, that nothing in this act shall be so construed as to prohibit any legalized osteopath in this state from practicing major or operative surgery after having passed a satisfactory examination in surgery before the state board of medical examiners of the state of Montana.

History: En. Ch. 51, L. 1905; re-en. Sec. 1599, Rev. C. 1907; re-en. Sec. 3130, R. C. M. 1921.

Osteopath Not Permitted to Practice Minor Surgery

Contention that amendment of this section by Ch. 51, Laws 1905, whereby word

"minor" was omitted from earlier act, had effect of permitting a licensed osteopath to practice minor surgery held untenable. State v. Thierfelder, 114 M 104, 116, 132 P 2d 1035, overruled on another point in 117 M 26, 35, 153 P 2d 163.

Penalty-Jurisdiction in District Court

Whether an osteopath charged with practicing medicine and surgery without a license is prosecuted under this section or section 66-1007, the case falls within the exclusive jurisdiction of the district court, and not within that of the justice of the

peace. Section 66-1408 prescribes the penalty for violation of section 66-1406, both having the same history, Ch. 51, Laws 1905. In both instances the penalty exceeds justice court jurisdiction, i. e., a fine not exceeding \$1,000 and imprisonment not exceeding one year. State ex rel. Freebourn v. District Court, 105 M 77, 79, 69 P 2d 748.

Collateral References

Physicians and Surgeons 5.
70 C.J.S. Physicians and Surgeons § 15.

66-1407. (3131) Record of license. The person receiving such license shall have it recorded in the office of the county clerk in the county in which he or she resides, and the record shall be endorsed thereon. In case the person so licensed shall remove to another county to practice, the holder shall record the license in a like manner in the county into which he or she removed, and the county clerk is entitled to charge and receive the usual fee for making such record.

History: En. Ch. 51, L. 1905; re-en. Sec. 1600, Rev. C. 1907; re-en. Sec. 3131, R. C. M. 1921.

66-1408. (3132) Practice of osteopathy without license prohibited. Any person practicing osteopathy in this state without first obtaining a license herein provided for, or contrary to the provisions of this act, or who, for the purpose of obtaining such license, shall falsely represent himself or herself to be the holder of a diploma as herein provided, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, nor less than two hundred and fifty dollars, or by imprisonment in the county jail not exceeding one year, nor less than ninety days, or by both fine and imprisonment for each and every such offense. It shall be the duty of the respective county attorneys to prosecute violations of this act.

History: En. Sec. 8, p. 51, L. 1901; amd. Sec. 8, Ch. 51, L. 1905; amd. Sec. 1, Ch. 112, L. 1907; re-en. Sec. 1601, Rev. C. 1907; re-en. Sec. 3132, R. C. M. 1921.

Prescribes Penalty for Violation of Section 66-1406 Supra

This section prescribes the penalty for violation of section 66-1406, reference

being had to the history of both sections, Ch. 51, Laws 1905. State ex rel. Freebourn v. District Court, 105 M 77, 81, 69 P 2d 748.

Collateral References

Physicians and Surgeons \$6. 70 C.J.S. Physicians and Surgeons § 30.

66-1409. (3133) Revocation of certificate. Any such certificate may be revoked by said board, upon satisfactory proof of fraud, or misrepresentation in procuring the same, or for any violation of the provisions of this act, or any gross immorality by the holder of such certificate.

History: En. Sec. 9, p. 51, L. 1901; re-en. Sec. 9, Ch. 51, L. 1905; re-en. Sec. 1602, Rev. C. 1907; re-en. Sec. 3133, R. C. M. 1921.

Collateral References

Physicians and Surgeons 11. 70 C.J.S. Physicians and Surgeons § 16.

66-1410. (3134) Compensation of board—report to governor. Out of the funds coming into the possession of said board each of the members of said board may receive as compensation the sum of five dollars for each day actually engaged in the duties of their office, together with all legitimate and necessary expenses incurred in attending the meetings of said board. No part of the compensation or other expenses of said board shall be paid out of the state treasury. The fees coming into the treasury of said board shall be paid out upon a warrant of the president and secretary thereof in payment of the compensation and expenses of said board in carrying out the provisions of this act. Said board shall make an annual report of its proceedings to the governor of the state for the year ending on the thirty-first day of December preceding the making of said report. Said report shall be filed with the governor on or before the fifteenth day of January of each year.

History: En. Sec. 10, p. 51, L. 1901; 1603, Rev. C. 1907; re-en. Sec. 3134, R. re-en. Sec. 10, Ch. 51, L. 1905; re-en. Sec. C. M. 1921.

66-1411. (3135) Graduates may be licensed without examination—practitioners from other states. Every graduate of a reputable school of osteopathy, who has been strictly examined and thereafter licensed to practice osteopathy in another state, may be licensed to practice osteopathy in this state upon the production to the board of his or her diploma, and the license obtained in such other state and satisfactory evidence of good moral character, and the payment of all legal fees required of other applicants; but the board may examine the applicant as to his or her qualifications.

History: En. Sec. 11, Ch. 51, L. 1905; re-en. Sec. 1604, Rev. C. 1907; re-en. Sec. 3135, R. C. M. 1921.

- **66-1412.** (3136) **Definition of term "practicing osteopathy."** Every person shall be deemed practicing osteopathy within the meaning of this act who shall:
- 1. Append to, or use in connection with his or her name the words "doctor of osteopathy, or diplomat of osteopathy, or osteopath, or osteopathist, or osteopathic practitioner, or osteopathic physician," or words of like import, or any abbreviation thereof, or the letters "D.O."; or who shall
- 2. Profess publicly to, or who shall, either on his own behalf, in his own name, or in his trade name, or in behalf of any other person, corporation, association, partnership, either as manager, bookkeeper, practitioner, or agent, treat, cure, alleviate, or relieve any ailment or disease of either mind or body, or cure or relieve any fracture or misplacement or abnormal condition, or bodily injury or deformity, by any treatment, or manipulation or method of manipulating a human body or any of its limbs, muscles, or parts, by the use of the hands, or mechanical appliances, in an effort or attempt to relieve any pressure, obstruction, misplacement, or defect, in any bone, muscle, ligament, nerve, vessel, organ, or part of the body, after having received, or with the intent or expectation of receiving therefor, either directly or indirectly, any bonus, gift, or compensation whatsoever; provided, however, that nothing in this section shall be construed

to restrain or restrict any legally licensed physician or surgeon in the practice of his profession.

History: Ap. p. Sec. 12, Ch. 51, L. 1905; amd. Sec. 2, Ch. 112, L. 1907; re-en. Sec. 1605, Rev. C. 1907; re-en. Sec. 3136, R. C. M. 1921.

License Required

Unless an exception found in a statute is part of the definition of the offense sought to be described, the state is not required to negative such exception in an indictment or information. The proviso contained in the second subdivision of the above section is not such an exception, since neither physician nor surgeon can practice osteopathy without first obtaining a license therefor. State v. Wood, 53 M 566, 569 et seq., 165 P 592; State v. Hopkins, 54 M 52, 166 P 304.

A physician or surgeon is not entitled,

A physician or surgeon is not entitled, under the statute, to practice osteopathy without a license from the state board of osteopathic examiners. State v. Hopkins,

54 M 52, 59, 166 P 304.

Method of Treatment

This section does not authorize an osteopath to practice medicine or surgery, but requires him to confine his practice to treatment by the use of the hands or mechanical appliances. State v. Dodd, 51 M 100, 106, 149 P 481.

"Osteopathy," as defined by its founder,

"Osteopatny," as defined by its founder, dictionaries and decisions of courts, brief-

ly stated, "administers no drugs and uses no knife." State v. Thierfelder, 114 M 104, 118, 132 P 2d 1035, overruled on another point in 117 M 26, 35, 156 P 2d 163.

Practice of Surgery Prohibited

In amending the original act under which the osteopath was forbidden to practice "major, minor or operative surgery" by striking out the word "minor," the legislature did not intend to permit minor surgery. State v. Thierfelder, 114 M 104, 116, 132 P 2d 1035, overruled on another point in 117 M 26, 35, 156 P 2d 163.

Under the osteopathic act the practitioner is not authorized to perform surgery of any kind, either major or minor. State v. Thierfelder, 114 M 104, 116, 132 P 2d 1035, overruled on another point in 117 M 26, 35, 156 P 2d 163.

Removal of Tonsils

An osteopath was practicing medicine without a license in removing tonsils. State v. Thierfelder, 114 M 104, 118, 132 P 2d 1035, overruled on another point in 117 M 26, 35, 156 P 2d 163.

Collateral References

Physicians and Surgeons 3 et seq. 70 C.J.S. Physicians and Surgeons § 2.

66-1413. (3137) Osteopathy not practice of medicine. The system, method, or science of treating diseases of the human body, commonly known as osteopathy, is hereby declared not to be the practice of medicine or surgery within the meaning of sections 66-1001 to 66-1009, and not subject to the provisions of said sections.

History: En. Sec. 11, p. 51, L. 1901; re-en. Sec. 13, Ch. 51, L. 1905; re-en. Sec. 1606, Rev. C. 1907; re-en. Sec. 3137, R. C. M. 1921.

References

Johnson v. City of Great Falls, 38 M 369, 374, 99 P 1059; State v. Hopkins, 54 M 52, 57, 166 P 304.

CHAPTER 15

PHARMACY—REGULATION OF SALE OF DRUGS AND MEDICINES

Section 66-1501. Sale of drugs, medicines, etc., unlawful except as provided herein.

66-1502. Terms defined as used in this act.

66-1503. Montana state board of pharmacy—qualifications of members—term and appointment.

66-1504. Montana state board of pharmacy-powers of board.

66-1505. Salaries and expenses of officers of board.

66-1506. Examination of applicants for registration—fees—certificates.

66-1507. Annual renewal of registration fees.

66-1508. Store license—certified pharmacy license—suspension or revocation.

66-1509. Judicial review of acts of board.

66-1510. Sale of poisons regulated.

66-1511. Poison register to be kept by pharmacists may be required by state board of pharmacy.

Revocation of license for failure to keep record or falsifying. 66-1512. Sale of poison without keeping register constitutes misdemeanor.
Restrictions upon sale or prescription of opiates—coding of prescriptions prohibited—refilling prescriptions.
Penalty for violation of act. 66-1513. 66-1514.

66-1515. Physicians to report prescriptions issued to drug addicts. 66-1516.

Arrest and commitment of drug addicts. 66-1517. Delivery of drug addict to institution. Payment of costs. 66-1518.

66-1519.

Report of information concerning drug users. 66-1520.

Attorney general to be attorney for state board of pharmacy—prosecutions—secretary to assist in enforcement—duties of county 66-1521.

Use of words "drug store," "pharmacy," etc. 66-1522.

Wrongful labeling. 66-1523.

Quality of drugs sold-adulteration-who is responsible. 66-1524.

66-1525. Exceptions.

Violation of act a misdemeanor. 66-1526.

Disposition of fees and fines. 66-1527.

- 66-1501. (3170) Sale of drugs, medicines, etc., unlawful except as provided herein. (a) It shall be unlawful for any person to compound, dispense, vend or sell at retail, drugs, medicines, chemicals or poisons in any place other than a pharmacy, except as hereinafter provided.
- It shall be unlawful for any proprietor, owner or manager of a pharmacy, or any other person to permit the compounding or dispensing of prescriptions or the vending or selling at retail of drugs, medicines, chemicals, or poisons in any pharmacy except by a registered and licensed pharmacist or by an assistant pharmacist in the temporary absence of such pharmacist.
- (c) It shall be unlawful for any person falsely to assume or pretend to the title of pharmacist or assistant pharmacist unless such person has a license as such issued and in force pursuant to the terms of this act.
- (d) It shall be unlawful for any person other than a licensed and registered pharmacist, an assistant licensed and registered pharmacist to compound, dispense, vend or sell at retail, drugs, medicines, chemicals or poisons, except as in this act provided.

History: En. Sec. 640, Pol. C. 1895; re-en. Sec. 1622, Rev. C. 1907; re-en. Sec. 1, Ch. 134, L. 1915; re-en. Sec. 3170, R. C. M. 1921; amd. Sec. 1, Ch. 175, L. 1939.

Cross-References

Exemption from jury duty, sec. 93-1303. Improper filling of prescriptions, sec.

Liquor regulations, secs. 4-134, 4-135,

Medicine for cure of venereal disease, not to prescribe, sec. 69-1112.

Spoiled drugs, sale forbidden, sec. 94-

Constitutionality

On appeal of defendant grocer in a prosecution for selling aspirin in the original package, this section held unconstitutional as to drugs and medicine which are sold in the manufacturer's original packages, and the sale of which is not

specifically prohibited by some other statute not mentioned in the supreme court opinion here cited, because not a valid exercise of the police power. State v. Stephens, 102 M 414, 418, 423, 59 P 2d 54.

Police Regulation

The practice of pharmacy is a proper subject for police regulation. Johnson v. City of Great Falls, 38 M 369, 373, 99 P 1059.

Collateral References

Druggists 3. 28 C.J.S. Druggists § 3.

Failure of druggist or apothecary to procure license as affecting validity of contracts. 30 ALR 834; 42 ALR 1226 and 118 ALR 646.

Construction and effect of statutes in relation to operation of drugstore, pharmacy, or chemical store without a registered pharmacist. 74 ALR 1084.

What substances or commodities are within statutory term "proprietary or patent medicine." 76 ALR 1207.

- 66-1502. (3170.1) Terms defined as used in this act. (a) The term "pharmacy" shall mean a drug store or other established place regularly registered by the state board of pharmacy, in which prescriptions, drugs, medicines, chemicals, and poisons are compounded, dispensed, vended or sold at retail.
- (b) The term "pharmacist" shall mean a natural person licensed by the state board of pharmacy to prepare, compound, dispense and sell drugs, medicines, chemicals and poisons, and such person shall be entitled to affix to his name the term REG-PH.
- (c) The term "assistant pharmacist" shall mean a natural person licensed as such by the state board of pharmacy to prepare, compound, dispense and sell drugs, medicines, chemicals and poisons in a pharmacy having a pharmacist in charge.
- (d) The term "drug" means (1) articles recognized in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, or official national formulary, or any supplement to any of them; and (2) articles intended for use in diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (4) articles intended for use as a component of any article specified in clause (1), (2) or (3); but does not include devices or their components, parts or accessories.
- (e) The term "medicine" shall mean any remedial agent which has the property of curing, preventing, treating or mitigating diseases, or which is used for such purpose.
- (f) "Poisons" shall mean any substance, which when introduced into the system, either directly or by absorption, produces violent, morbid or fatal changes or which destroys living tissue with which it comes in contact.
- (g) "Chemical" means all medicinal or industrial substances, whether simple or compound or obtained through the process of the science and art of chemistry, whether of organic or inorganic origin.
- (h) The term "board" or "state board of pharmacy" shall mean the Montana state board of pharmacy.
- (i) The term "secretary" shall mean the secretary of the Montana state board of pharmacy.
- (j) The word "person" shall be construed to include every individual, copartnership, corporation or association, unless the context otherwise requires.
- (k) Masculine words shall include the feminine and neuter and the singular includes the plural.
- (l) The term "wholesale" shall mean and include any sale for the purpose of resale.
- (m) The phrase "commercial purposes" shall mean the ordinary purposes of trade, agriculture, industry and commerce, exclusive of the practices of medicine and pharmacy.

(n) The term "prescription" shall mean an order given individually for the person for whom prescribed directly from the prescriber to the furnisher or indirectly to the furnisher by means of an order signed by the prescriber and shall bear the name and address of the prescriber, his license classification, the name of the patient, the name and the quantity of the drug or drugs prescribed, the directions for use and the date of its issue. These stipulations would apply to both written and telephoned prescriptions.

History: En. Sec. 2, Ch. 175, L. 1939; amd. Sec. 1, Ch. 33, L. 1951.

66-1503. (3173) Montana state board of pharmacy—qualifications of members—term and appointment. The Montana state board of pharmacy shall consist of three (3) pharmacists who shall be graduates of the college of pharmacy of the state university of Montana or of a college or school of pharmacy recognized and approved by, or a member of, the American Association of Colleges of Pharmacy; each of whom shall have had at least five (5) consecutive years of practical experience as a pharmacist immediately preceding his appointment; provided, however, that one (1) member of the board may be a registered pharmacist of fifteen (15) years practical experience and actually engaged in the practice of pharmacy.

Term of office. The members of the board shall be appointed by the governor from the list hereinafter subscribed, one in each year; each member shall serve for a term of three (3) years and until his successor shall have been appointed and qualified. Vacancies shall be filled by appointment by the governor for the unexpired term. Any member of the board who, during his incumbency, ceases to be actively engaged in the practice of pharmacy in this state, shall be automatically disqualified from membership upon the board, and such disqualification shall result in a vacancy which may be filled as provided. Any member may be removed from office by the governor upon proof of malfeasance or misfeasance in office after reasonable notice of charges against him and fair hearing thereon. The members of the Montana state board of pharmacy heretofore appointed and now holding office shall continue in office as members of the board hereby established until their respective terms expire. The Montana State Pharmaceutical Association shall annually submit to the governor the names of five (5) persons, qualified as prescribed herein, for each appointment to be made, from which list the governor shall appoint a member or members of the board as heretofore prescribed.

History: En. Sec. 643, Pol. C. 1895; 4, Ch. 134, L. 1915; re-en. Sec. 3173, R. C. re-en. Sec. 1625, Rev. C. 1907; re-en. Sec. M. 1921; amd. Sec. 3, Ch. 175, L. 1939.

- 66-1504. (3174) Montana state board of pharmacy—powers of board. (a) Organization of board, officers. The board shall annually elect from its members a president, a vice-president, a treasurer, and a pharmacist, who may or may not be a member, as secretary.
- (b) Powers and duties of board of pharmacy. The Montana state board of pharmacy shall have power, and it shall be its duty:
- (1) To regulate the practice of pharmacy in the state of Montana subject to the provisions of this act.

- (2) To determine the minimum equipment necessary in and for a pharmacy and drug store.
- (3) To regulate, under therapeutic classification, the sale of drugs, medicines, chemicals and poisons and their labeling.
- (4) To regulate the quality of all drugs and medicines dispensed in this state, using the United States pharmacopoeia and the national formulary, or any revisions thereof, as the standards.
- (5) To enter and inspect by its duly authorized representative at any reasonable times any and all places where drugs, medicines, chemicals or poisons are sold, vended, given away, compounded, dispensed or manufactured. It shall be a misdemeanor for any person to refuse to permit or otherwise prevent such representative from entering any such places and making such inspection.
- (6) To examine, license and register as pharmacists all applicants whom the board shall deem qualified as such as prescribed herein. To license pharmacies and certain stores, and to issue certificates of "certified pharmacy" as in this act provided.
- (7) To revoke temporarily or permanently, upon fair hearing, after reasonable notice of formal charges have been served, licenses issued by it to any pharmacist or assistant pharmacist whenever the holder of such license has obtained the same by false representations or fraud of any character or shall be an habitual drunkard or addicted to the use of narcotic drugs, or shall have been convicted of a felony, or shall have been convicted of violating the pharmacy law, or shall have been found guilty by the board of incompetency in the preparation of prescriptions, or guilty of gross immorality affecting the discharge of his duties as a pharmacist or assistant subject to the right of any person whose license may be revoked to review by the district court of the proper county on any question of law and fact.
- (8) To report its proceedings annually to the governor and to the state pharmaceutical association with such information and recommendations as it deem proper, giving the names of pharmacists and assistant pharmacists registered and licensed during the year, and the items of its receipts and disbursements.
- (9) To employ necessary assistants, and make rules for the conduct of its business.
- (10) To perform such other duties and exercise such other powers as the provisions of the act may require.
- (11) For the purposes aforesaid, it shall also be the duty of the board to make and publish uniform rules and regulations not inconsistent herewith, for carrying out and enforcing the provisions of the act.

History: En. Sec. 644, Pol. C. 1895; re-en. Sec. 1626, Rev. C. 1907; re-en. Sec. 5, Ch. 134, L. 1915; re-en. Sec. 3174, R. C. M. 1921; amd. Sec. 4, Ch. 175, L. 1939.

Collateral References
Druggists = 1, 3.
28 C.J.S. Druggists §§ 2, 3, 4.

66-1505. (3175) Salaries and expenses of officers of board. Each member of the board shall receive five dollars (\$5.00) a day for his actual services as such, and his necessary expenses in attending meetings. The secretary shall receive a salary to be fixed by the board, and all expenses necessarily

incurred by him in the performance of his duties. The secretary shall give bond in such amount as the board may from time to time require, which bond shall be conditioned for the faithful performance of his duties and shall be approved by the board.

History: En. Sec. 645, Pol. C. 1895; 6, Ch. 134, L. 1915; re-en. Sec. 3175, R. re-en. Sec. 1627, Rev. C. 1907; re-en. Sec. C. M. 1921; amd. Sec. 5, Ch. 175, L. 1939.

66-1506. (3176) Examination of applicants for registration—fees—certificates. (a) The board shall meet at least once a year to examine applicants for registration as pharmacists and assistant pharmacists and to transact its other business, giving reasonable notice of all examinations by mail, to all known applicants therefor. The secretary shall record the names of all persons examined by the board together with the grounds upon which the right of each to examination was claimed and also the names of all persons registered by examination or otherwise. The fee for any examination shall be fifteen dollars (\$15.00) which fee may, in the discretion of the board, be returned to applicants not taking the examination.

- (b) Upon again making payment of such fee any applicant who fails may be entitled to take the next succeeding examination free of charge.
- (c) Fees for registration by reciprocity shall be twenty-five dollars (\$25.00).

Qualifications for examination. To be entitled to examination by the board as a pharmacist, the applicant shall be a citizen of the United States, of good moral character, at least twenty-one years of age, and shall be a graduate of the school of pharmacy of the state university of Montana or of a college or school of pharmacy recognized and approved by, or a member, of the American Association of Colleges of Pharmacy, but such applicant shall not receive a license until he has at least one year of practical experience in a pharmacy which has been approved by the board of pharmacy. During this year, provided applicant has passed such examination, he shall be licensed as an assistant pharmacist only.

Reciprocity. The board may, in its discretion, grant registration without examination, to any pharmacist licensed by the board of pharmacy or a similar board of another state which accords similar recognition to licensees of this state, provided the requirements for registration in such other state are, in the opinion of the board, equivalent to the requirements herein provided. Every person licensed and registered under this act shall receive from the state board of pharmacy an appropriate certificate attesting the fact as it may be which certificate shall be conspicuously displayed at all times in his place of business. If the holder be entitled to manage or conduct a pharmacy in the state for himself or another, the fact shall be set forth in the certificate.

Pharmacists or assistants not required to be examined or to register anew under this act. Persons, who, at the time of the enactment of this law, hold certificates of registration as pharmacists, or assistant pharmacists, granted by the state board of pharmacy of this state, shall not be required to submit to examinations or to register anew under this law, but all such persons shall apply for and secure annual renewals of their present registration as provided in this act, and in all other respects be amenable to

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and governed by the provisions of this act and the rules and regulations of the board from time to time promulgated under this act.

History: En. Sec. 646, Pol. C. 1895; 7, Ch. 134, L. 1915; re-en. Sec. 3176, R. re-en. Sec. 1628, Rev. C. 1907; re-en. Sec. C. M. 1921; amd. Sec. 6, Ch. 175, L. 1939.

66-1507. (3177) Annual renewal of registration fees. Every person licensed and registered by the board shall annually pay to the board a renewal of registration fee of five dollars (\$5.00). It shall be unlawful for any such person who refuses or fails to pay such renewal fee to practice pharmacy in this state. The practice of pharmacy in the state of Montana is declared a professional practice affecting the public health, safety and welfare and is subject to regulation and control in the public interest. Every certificate and renewal shall expire at the time prescribed, not later than one (1) year from its date. Any person who has been registered and licensed by the board and has defaulted in the payment of said renewal fee may be reinstated within two (2) years of such default without examination upon payment of the arrears.

History: En. Sec. 647, Pol. C. 1895; M. 1921; amd. Sec. 7, Ch. 175, L. 1939; re-en. Sec. 1629, Rev. C. 1907; re-en. Sec. amd. Sec. 1, Ch. 70, L. 1957. 8, Ch. 134, L. 1915; re-en. Sec. 3177, R. C.

- **66-1508.** Store license—certified pharmacy license—suspension or revocation. (a) The state board of pharmacy shall upon application upon such forms as it may prescribe and upon the payment of an annual fee of five dollars (\$5.00), license stores other than a pharmacy wherein may be sold ordinary household or medicinal drugs prepared in sealed packages or bottles by a manufacturer, qualified under the laws of the state wherein such manufacturer resides. The name and address of such manufacturer shall appear conspicuously on each package sold by such licensee. It shall be unlawful for any such store to sell, deliver or give away such household medicinal drugs, without first having secured such license and thereafter keeping the same in force by proper renewal, provided, also, that nothing herein shall be construed to prevent any vendor from selling any patent or proprietary medicine in the original package when plainly labeled, nor such nonmedical articles as are usually sold by such vendors.
- (b) The state board of pharmacy shall require and provide for the annual registration and licensing of every pharmacy now or hereafter doing business within this state within the meaning of the act. Upon presentation of evidence satisfactory to the board and upon application upon such form as the board may prescribe and upon the payment of an annual fee of five dollars (\$5.00), the board shall license any pharmacy as a "CERTIFIED PHARMACY," provided, however, that such license shall be granted only to such pharmacies as are operated by registered pharmacists or assistant registered pharmacists qualified as herein prescribed. Such license must be exposed in a conspicuous place in the pharmacy for which it is issued, and shall expire on the thirtieth day of June following the date of issue. It shall be unlawful for any person to conduct such pharmacy unless such license has been duly issued and is in full force and effect.

(c) The board may suspend, revoke or refuse to renew any store or pharmacy license obtained by false representation, or fraud of any character, or when the pharmacy for which the license shall have been issued is kept open for the transaction of business without a pharmacist in charge thereof, or when the person to whom the license shall have been granted has been convicted for violation of any of the provisions of the act or for a felony, or convicted for any violation of the Federal Food, Drug and Cosmetic Act of June 25, 1938, (52 United States Statutes at Large, 1040 through 1059; Title 21, United States Code, sections 301-392 as from time to time revised, amended, and supplemented), or, if a natural person, whose pharmacist or assistant pharmacist license has been revoked, or when the store or pharmacy is conducted in violation of the provisions of this act. Before any license can be revoked the holder thereof shall be entitled to a hearing by the board after reasonable notice, and judicial review of the action of the board.

History: En. Sec. 8, Ch. 175, L. 1939; amd. Sec. 1, Ch. 76, L. 1959.

Collateral References

What substances or commodities are within statutory term "proprietary or patent medicine." 76 ALR 1207.

- 66-1509. Judicial review of acts of board. (a) Review by the district court of any order revoking either permanently or temporarily a license of any pharmacist or assistant pharmacist, or any store or pharmacy, or any order, decision or finding of the board shall be made by petition in writing filed with the clerk of the district court of the county wherein the pharmacist or assistant pharmacist, store or pharmacy, or other affected person or business was operating at the time of the revocation of any such license, or at the time of such order, decision or finding. The petition shall concisely state the facts and order complained against.
- (b) Upon the filing of said petition an order shall be made by the district judge setting a time for hearing on said petition not less than twenty (20) days thereafter and directing service of the petition upon the secretary of the board not less than three (3) days thereafter. The board must file and serve answer on the merits not less than five (5) days before the hearing.
- (c) The court shall have power to sustain the board's action or annul the same, or order the board to act further or to restore any revoked license. Appeals from the district court's action to the supreme court may be taken at any time within sixty (60) days after the entry of the final order or judgment of the court.

History: En. Sec. 9, Ch. 175, L. 1939.

Cross-Reference

Application of Montana Rules of Civil Procedure to this section, sec. 93-2711-7.

66-1510. (3185) Sale of poisons regulated. It shall be unlawful for any person, from and after the passage of this act, to retail any of the following named poisons, to wit: Arsenic and its preparations, corrosive sublimate, white and red precipitate, biniodide of mercury, cyanide of potassium, hydrocyanic acid, strychnine, and all poisonous vegetable alkaloids and their salts, the essential oil of almonds; opium and its preparations, ex-

cept paregoric and other preparations of opium containing less than two grains to the ounce; aconite, belladonna, colchicum, conium, nux vomica, digitalis, and their pharmaceutical preparations; croton oil, chloroform, chloral hydrate, sulphate of zinc, mineral acids, carbolic acid, oxalic acid; wood alcohol; without labeling the box, bottle, vessel, paper or package in which said poison is contained, with the name of the article, and the word "poison," and the name and place of business of the seller. Also, each label of such poison shall contain a concise statement of the principal antidotes for the poison so labeled. The label hereby required to be placed upon wood alcohol shall contain the following: "Warning. The fumes of wood alcohol burned in a close room, if inhaled, are injurious to eyesight, often producing total blindness." Nor shall it be lawful for any person to deliver or sell any poisons enumerated above, unless upon due inquiry it be found that the purchaser is aware of its poisonous character, and represents that it be used for a legitimate purpose. The provisions of this section shall not apply to the dispensing of poisons in not unusual quantities or doses upon the prescription of practitioners of medicine. Any person or persons violating the provisions of this section shall be deemed guilty of a misdemeanor; provided, however, that this section shall not apply to manufacturers making and selling at wholesale any of the above poisons, and provided that each bottle, box, vessel, paper, or package in which said poison is contained shall be labeled with the name of the article, the word "poison," and the name and place of business of the seller.

History: En. Sec. 1, Ch. 156, L. 1907; Sec. 1636, Rev. C. 1907; re-en. Sec. 3185, R. C. M. 1921.

Collateral References

Druggists 5; Poisons 2 et seq. 28 C.J.S. Druggists § 6; 72 C.J.S. Poisons § 4 et seq.

17A Am. Jur. 512, Drugs and Druggists, §§ 7 et seq.

Constitutionality of statute regulating sale of poisons, drugs or medicines. 54 ALR 730.

Criminal responsibility of druggist for injury in consequence of mistake. 55 ALR 2d 714.

66-1511. (3185.1) Poison register to be kept by pharmacists may be required by state board of pharmacy. The Montana state board of pharmacy may by a rule or rules adopted by said board, require every registered pharmacist to keep a poison register which may require a record of all poisons sold or disposed of, the signature of the purchaser and such other information in relation thereto as may be required by said board and said board may provide by rule what are to be deemed poisons within the terms of this law and the rule or rules adopted.

History: En. Sec. 1, Ch. 11, L. 1935.

66-1512. (3185.2) Revocation of license for failure to keep record or falsifying. In the event any pharmacist shall sell or dispose of any such poison without keeping a record of same, or shall keep any false record thereof, or shall permit the sale or disposal of same without keeping such record, or shall otherwise violate the rule or rules so promulgated by the Montana state board of pharmacy, such board may, upon notice and after a hearing, revoke the license of such pharmacist for any violation of said rule.

History: En. Sec. 2, Ch. 11, L. 1935.

Collateral References

Druggists 3; Poisons 2. 28 C.J.S. Druggists §§ 3, 4; 72 C.J.S. Poisons § 4.

66-1513. (3185.3) Sale of poison without keeping register constitutes misdemeanor. The sale or disposal of any poison by any registered pharmacist without keeping a record thereof in a poison register, shall constitute a misdemeanor.

History: En. Sec. 3, Ch. 11, L. 1935.

Collateral References Druggists 5. 28 C.J.S. Druggists § 6.

(3187) Restrictions upon sale or prescription of opiates coding of prescriptions prohibited—refilling prescriptions. It shall be unlawful for any physician to sell, or give to, or prescribe for any person any opium, morphine, alkaloid-cocaine, or alpha or beta eucaine, or codeine or heroin, or any derivative, mixture or preparation of any of them, except to a patient believed in good faith to require the same for medical use, and in quantities proportioned to the needs of such patients.

A prescription must be so written that it can be compounded by any registered pharmacist. The coding of any prescription is a violation of this act. A prescription marked "non repetatur," "non rep" or "N. R." cannot be refilled. A prescription marked to be refilled by a specified amount may be filled by any registered pharmacist the number of times marked on the prescription. A prescription not bearing any limitation of refill may be refilled at will during the time specified. No narcotic prescription may be refilled.

History: En. Sec. 2, Ch. 11, L. 1911; re-en. Sec. 3187, R. C. M. 1921; amd. Sec. 2, Ch. 33, L. 1951.

Cross-References

Improper sale of opiates, sec. 94-35-199. Narcotic drug regulations, secs. 54-101 to 54-128.

References

State v. Brennan, 89 M 479, 482, 300 P 273.

Collateral References

Physicians and Surgeons 20; Poisons ©=2,7.
70 C.J.S. Physicians and Surgeons § 3;

72 C.J.S. Poisons § 4.

Harrison Narcotic Act. 13 ALR 858 and 39 ALR 236.

Constitutionality, construction, and application of Uniform Narcotic Drug Act. 119 ALR 1399.

Right of action at common law for damage sustained by plaintiff in consequence of sale or gift of habit-forming drugs to another. 75 ALR 2d 834.

66-1515. (3188) Penalty for violation of act. Any person found guilty of the violation of this act shall be punished for each separate offense (and each and every individual case shall constitute a separate offense) by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for a period of not less than sixty days nor more than one hundred days, or by both such fine and imprisonment.

History: En. Sec. 3, Ch. 11, L. 1911; re-en. Sec. 3188, R. C. M. 1921.

References

State v. Wong Fong, 75 M 81, 84, 241 P 1072; State v. Brennan, 89 M 479, 482, 300 P 273.

Collateral References

Druggists 11; Physicians and Surgeons 10; Poisons 9.

28 C.J.S. Druggists §§ 5, 12, 13, 14; 70 C.J.S. Physicians and Surgeons § 3; 72 C.J.S. Poisons § 4.

66-1516. (3194) Physicians to report prescriptions issued to drug addicts. A duly licensed physician duly licensed to practice medicine in Montana, who prescribes for, dispenses, administers, or in any manner gives any of the drugs mentioned in this act, to a person known to him or believed by him to be an habitual user or a drug addict, shall, within forty-eight hours, report to the county attorney of the county in which said physician prescribes for, dispenses, administers, or in any manner gives any of the drugs mentioned in this act, the name, address, physical and mental condition, and any necessary substantial information regarding such person. "An habitual user of such drugs" or "drug addict" is defined as follows: "Any person who has needed or demanded the prescribing for, dispensing or administering, or in any manner the giving of opium or coca leaves any of their derivatives, salts, preparations, or compounds, at more or less regular intervals for thirty consecutive days prior to the day such person applies to a physician or to a physician of any institution for the prescribing for, dispensing, administering, or the giving in any way of any such drugs or their derivatives." If a physician shall prescribe for, dispense, administer, or in any manner give any of the drugs mentioned in this act, daily for more than thirty days to a patient, such physician shall register with the county attorney the name of such person, together with a statement of the physical and mental condition of such person, and a prognosis as to the probable future necessity for continuing the prescribing, dispensing, administering, or the giving of such drugs to such patient, and such prognosis shall include an estimate as to the length of time which, according to the judgment of the physician, will be required to remove the necessity of administering the aforesaid narcotic drugs to such patient. It shall be the duty of the county attorney upon receipt of such notice to immediately file a complaint against such habitual user of drugs or drug addict in the district court of his county.

History: En. Sec. 6, Ch. 202, L. 1921; re-en. Sec. 3194, R. C. M. 1921.

295 P 1014; State v. Brennan, 89 M 479, 482, 300 P 273.

References

State v. Mark, 69 M 18, 22, 220 P 94; State v. Mun, 76 M 278, 280, 246 P 257; State v. Mah Sam Hing, 89 M 178, 181,

Collateral References

Physicians and Surgeons \$10. 70 C.J.S. Physicians and Surgeons § 3.

66-1517. (3195) Arrest and commitment of drug addicts. Whenever a complaint shall be made to any judge of the district court that any person is addicted to the use of drugs mentioned in this act in a manner contrary to the public welfare, such judge of the district court must issue and deliver to some peace officer for service a warrant of arrest, directing that such person be arrested and brought before said judge for examination, and if, after said examination, said judge is satisfied that said person is addicted to the use of the drugs mentioned in this act, in a manner contrary to the public welfare, he may commit such person to a state, county, city, or other hospital or institution where facilities are provided for the treatment of drug addicts. Whenever it is made to appear to the judge of the district

court that such person is no longer addicted to the use of the aforesaid drugs in a manner contrary to the public welfare, or at any other time in his discretion, he may order a discharge from such commitment. The provisions of this act shall not be construed to prohibit any person committed to any institution under its provisions from appealing for a review of the sufficiency of the evidence upon which the commitment was made.

History: En. Sec. 7, Ch. 202, L. 1921; re-en. Sec. 3195, R. C. M. 1921.

295 P 1014; State v. Brennan, 89 M 479, 482, 300 P 273.

References

State v. Mark, 69 M 18, 22, 220 P 94; State v. Mun, 76 M 278, 280, 246 P 257; State v. Mah Sam Hing, 89 M 178, 181,

Collateral References

Poisons © 2. 72 C.J.S. Poisons § 7.

66-1518. (3196) Delivery of drug addict to institution. The person so committed, together with a copy of the order of the judge committing him, must be delivered by the sheriff of the county to the person in charge of the hospital or institution to which said person is committed.

History: En. Sec. 8, Ch. 202, L. 1921; re-en. Sec. 3196, R. C. M. 1921.

State v. Mah Sam Hing, 89 M 178, 181, 295 P 1014; State v. Brennan, 89 M 479, 482, 300 P 273.

References

State v. Mark, 69 M 18, 22, 220 P 94; State v. Mun, 76 M 278, 280, 246 P 257;

66-1519. (3197) Payment of costs. All costs and expenses incurred in the arrest, examination, commitment, and maintenance of such person shall be paid in the manner now provided for by law for the arrest, examination, commitment, and maintenance of persons committed to the state insane asylum.

History: En. Sec. 9, Ch. 202, L. 1921; re-en. Sec. 3197, R. C. M. 1921.

State v. Mah Sam Hing, 89 M 178, 181, 295 P 1014; State v. Brennan, 89 M 479, 482, 300 P 273.

References

State v. Mark, 69 M 18, 22, 220 P 94; State v. Mun, 76 M 278, 280, 246 P 257;

66-1520. (3198) Report of information concerning drug users. It is hereby made the duty of police judges and magistrates, judges of municipal courts and justices of the peace to report immediately to the county attorney of the county wherein their said courts are established and conducted, any and all knowledge or information acquired or obtained by said police judge, magistrate, judges of municipal courts, and justices of the peace, in a trial of causes or hearings before them, which knowledge or information shows, or tends to show, that any person is a drug user or drug addict. If said person so shown to be a drug user or drug addict is under arrest or liberated on bail at the time said knowledge or information is acquired or obtained by said police judge or magistrate, judge of a municipal court, or justice of the peace, said person shall not be liberated, if under arrest, nor said bail discharged by said judge, magistrate, or justice of the peace until said report is made to the county attorney, as provided herein.

History: En. Sec. 10, Ch. 202, L. 1921; re-en. Sec. 3198, R. C. M. 1921.

References

State v. Mark, 69 M 18, 22, 220 P 94; State v. Mun, 76 M 278, 280, 246 P 257; State v. Mah Sam Hing, 89 M 178, 181, 295 P 1014; State v. Brennan, 89 M 479, 482, 300 P 273.

66-1521. (3202.10) Attorney general to be attorney for state board of pharmacy—prosecutions—secretary to assist in enforcement—duties of county attorneys. The attorney general of the state of Montana shall be the attorney for the Montana state board of pharmacy but said board may in its discretion employ other counsel. The secretary of the Montana state board of pharmacy shall, under such rules and regulations as the board may prescribe, assist the board and the attorney general or other counsel in the administration and enforcement of this act. It shall be the duty of the county attorney of any county wherein any offense hereunder is committed to prosecute the offender. The board, its secretary or the county attorney is authorized to examine the books of any manufacturer, druggist, store-keeper, wholesale dealer, pharmacist, assistant pharmacist or pharmacy within the state for the purpose of acquiring information to aid in prosecutions hereunder.

History: En. Sec. 4, Ch. 104, L. 1931; amd. Sec. 10, Ch. 175, L. 1939.

66-1522. Use of words "drug store," "pharmacy," etc. It shall be unlawful for any person to carry on, conduct or transact a retail business under a name which contains as a part thereof, the words, "drugs," "drug store," "pharmacy," "medicine," "apothecary," or "chemist shop," or any abbreviations, translations, extension or variation thereof; or in any manner by advertisement circular or poster, sign or otherwise, describe or refer to the place of business conducted by such person by such term, abbreviations, translation, extension or variation unless the place so conducted is a pharmacy within the meaning of this act, and duly licensed as such and in charge of a registered pharmacist.

History: En. Sec. 11, Ch. 175, L. 1939.

Unconstitutional

Since a store under sections 66-1508 and 66-1525 can sell ordinary household or medicinal drugs, it cannot be deprived of the use of the word "drug" in advertisement under this section since the act makes no requirement that the registered pharmacist who may use the name "drug" and sell the drugs make any analysis, inspection or examination of the drug to be passed on by him to the purchasing

public. Pike v. Porter, 126 M 482, 253 P 2d 1055, 1056.

The provision excluding those who are not registered pharmacists from the use of the word "drug" in advertising household drugs bears no reasonable relationship to the protection of human life, health or safety but merely discriminates in favor of a certain class and is in consequence unconstitutional and invalid. Pike v. Porter, 126 M 482, 253 P 2d 1055, 1057

66-1523. Wrongful labeling. It shall be unlawful for any person who prepares prescriptions, drugs, medicines, chemicals or poisons willfully, negligently or ignorantly to omit to label the package or receptacle, label it falsely, substitute an article different from the one ordered or deviate in any manner from the requirements of an order or prescription.

History: En. Sec. 12, Ch. 175, L. 1939.

Cross-Reference

Omission to label drugs, penalty, sec. 94-3505.

Collateral References

Criminal responsibility of druggist for injury in consequence of mistake, 55 ALR 2d 714.

- Quality of drugs sold—adulteration—who is responsible. (a) It shall be unlawful for any person or his agent to adulterate any drug, medicinal substance or preparation authorized by the United States pharmacopoeia or the national formulary or any revision thereof, or any drug, medicinal substance or preparation used or intended to be used in medical practice.
- It shall be unlawful to mix with any such article any foreign or inert substance for the purpose of weakening its medicinal effect or of cheapening it.
- Nothing in this act shall be construed to change any of the provisions of the Food, Drug and Cosmetic Act of Montana.

History: En. Sec. 13, Ch. 175, L. 1939. Collateral References

22 Am. Jur., Food, p. 828, §§ 31 et seq.; p. 871, §§ 84 et seq.

Entrapment to violate Pure Food and Drug Act. 18 ALR 187.

Constitutionality of regulations forbidding adulteration of milk. 18 ALR 235; 42 ALR 556; 58 ALR 672; 80 ALR 1225; 101 ALR 64; 110 ALR 644; 119 ALR 243

and 155 ALR 1383. Violation of Pure Food Act as "infamous" offense within constitutional or

statutory provision in relation to presentment or indictment by grand jury. 24 ALR 1016.

Preservative as adulterant within stat-

ute in relation to food, 50 ALR 76.
Statutory provisions relating to purity of food products as applicable to foreign substances which get into products as a result of accident or negligence, and not by purpose or design. 98 ALR 1496.
Penal offense predicated upon violation

of food law as affected by ignorance or mistake of fact, lack of criminal intent, or presence of good faith. 152 ALR 755.

- 66-1525. Exceptions. (a) Nothing in this act shall subject a person duly licensed in this state to practice medicine, dentistry or veterinary medicine to inspection by the board nor prevent such person from compounding or using drugs, medicines, chemicals or poisons in his practice nor prevent one duly licensed to practice medicine from furnishing to a patient such drugs, medicines, chemicals or poisons as he deems proper in the treatment of such patient.
- (b) Nothing herein shall prevent the sale of drugs; medicines, chemicals or poisons at wholesale.
- Nothing herein shall prevent the sale of drugs, chemicals or poisons, either at wholesale or retail, for use for commercial purposes, or in the arts, nor be construed to change any of the provisions of this code, relating to the sale of insecticides and fungicides, and nothing in this act shall prevent the sale of common household preparations and other drugs, provided stores selling same are licensed under the terms of this act.
- Nothing herein shall apply to or interfere with manufacture, wholesaling, vending, or retailing of flavoring extracts, toilet articles, cosmetics, perfumes, spices, and other commonly used household articles of a chemical nature, for use for nonmedicinal purposes.

History: En. Sec. 14, Ch. 175, L. 1939.

66-1526. (3202.11) Violation of act a misdemeanor. Any person, firm, copartnership or corporation violating any of the provisions of this act shall be guilty of a misdemeanor and upon conviction for each violation shall be punished accordingly, and any thereof so convicted shall automatically lose any license issued by the board.

History: En. Sec. 5, Ch. 104, L. 1931; amd. Sec. 15, Ch. 175, L. 1939.

- 66-1527. (3202.12) Disposition of fees and fines. (a) The board shall, in each year, turn over out of the annual fees collected by the board to the Montana State Pharmaceutical Association for the advancement of the science and art of pharmacy, and for the enforcement of this or any other law relating to drug stores, or other stores licensed herein, or relating to pharmacists, two dollars (\$2.00) for each pharmacist and assistant pharmacist who shall have paid his renewal fee during such year.
- (b) All fees collected by or under the authority of the state board of pharmacy of the state of Montana for registration and licenses issued under this act shall be transmitted to the state board of pharmacy as provided by law.
- (c) All fines paid under the provisions of this act or in connection with the enforcement thereof shall be paid to the credit of the common school fund of the state of Montana; provided that no salaries or expenses of the board of pharmacy shall be paid out of the state treasury.
- (d) On or before June 30th in each fiscal year the board shall remit to the state treasurer for the credit of and to be paid into the general fund, any moneys in its possession in excess of the sum of fifteen hundred dollars (\$1500.00).

History: En. Sec. 6, Ch. 104, L. 1931; amd. Sec. 16, Ch. 175, L. 1939.

CHAPTER 16

PAWNBROKERS AND JUNK DEALERS-REGULATIONS

Section 66-1601. Interest pawnbrokers may receive.

66-1602. Search warrant may issue.

66-1603, Service of.

66-1604. Delivery of property to claimant-bond.

66-1605. Conditions of bond. 66-1606. Must keep register.

66-1607. Penalties.

66-1601. (4186) **Interest pawnbrokers may receive.** No person must [may] carry on the business of pawnbroker or junk dealer by receiving goods pawned, or in pledge for loans, at any rate of interest above ten per cent per annum, without first obtaining a license. There must be no other or greater amount received by any pawnbroker or junk dealer, his employees or agents, for interest, commission, discount, storage, or caring for property pledged, than the rate of three per cent per month.

History: This section first enacted in substance as one of Secs. 1 to 8, pp. 206-207, L. 1889; amd. Sec. 3310, Pol. C. 1895; appeared as Sec. 2105, Rev. C. 1907; re-en. Sec. 4186, R. C. M. 1921.

Compiler's Note

The bracketed word "may" was inserted by the compiler.

Cross-References

Cities may license, sec. 11-918.
County license, sec. 84-3201.
Interest chargeable by pawnbrokers without license, penalty for overcharge, secs. 94-3701, 94-3703.

Collateral References

Pawnbrokers and Money Lenders 4, 6.

70 C.J.S. Pawnbrokers § 5. 40 Am. Jur. 695, Pawnbrokers and Money Lenders, § 7.

Enforcement of contract by unlicensed lenders, 30 ALR 834; 42 ALR 1226 and 118 ALR 646.

Necessity of dealer's license to authorize sale of articles taken as security for or to satisfy a debt. 36 ALR 684. Retrospective application and effect of

Retrospective application and effect of statutory provision for interest or changed rate of interest. 4 ALR 2d 932.

66-1602. (4187) Search warrant may issue. Whenever any person makes oath before a magistrate that any property belonging to him has been embezzled or taken without his consent, and that he has reason to believe or suspect, and does suspect, that such property has been pledged with any pawnbroker or junk dealer, such magistrate, if satisfied, must issue his warrant to search for the property so taken, and if found, to seize and bring the same before him.

History: First enacted in substance as one of Secs. 1 to 8, pp. 206-207, L. 1889; amd. Sec. 3311, Pol. C. 1895; re-en. as Sec. 2106, Rev. C. 1907; re-en. Sec. 4187, R. C. M. 1921.

Collateral References

Searches and Seizures \$3(1).
79 C.J.S. Searches and Seizures § 66 et

66-1603. (4188) Service of. The officer to whom said warrant is directed and delivered must execute the same, and proceed in the same manner as in case of other search warrant.

History: En. in substance as one of Secs. 1 to 8, pp. 206-207, L. 1889; amd. Sec. 3312, Pol. C. 1895; re-en. as Sec. 2107, Rev. C. 1907; re-en. Sec. 4188, R. C. M. 1921.

Collateral References

Searches and Seizures €3(9). 79 C.J.S. Searches and Seizures § 64.

66-1604. (4189) Delivery of property to claimant—bond. Upon any property seized by virtue of such warrant being brought before the magistrate who issued the same, he must cause such property to be delivered to the person so claiming to be the owner thereof, on whose application the warrant was issued, on his executing a bond as hereinafter directed; and if such bond be not executed within forty-eight hours, the magistrate must cause the said property to be delivered to the person from whose possession it was taken.

History: En. in substance as one of Secs. 1 to 8, pp. 206-207, L. 1889; amd. Sec. 3313, Pol. C. 1895; re-en. Sec. 2108, Rev. C. 1907; re-en. Sec. 4189, R. C. M. 1921.

Collateral References

Searches and Seizures 5.
79 C.J.S. Searches and Seizures § 112.

66-1605. (4190) Conditions of bond. The bond must be in a penal sum equal to double the value of the property claimed, with two sureties approved by the magistrate in favor of the person from whose possession the property was taken, with a condition that the claimant will, on demand, pay all damage that may be recovered against him in any suit to be brought within twenty days from the date of such bond, by the pawnbroker or junk dealer from whose possession the property was taken.

History: En. in substance as one of Rev. C. 1907; re-en. Sec. 4190, R. C. M. Secs. 1 to 8, pp. 206-207, L. 1889; amd. 1921. Sec. 3314, Pol. C. 1895; re-en. Sec. 2109,

66-1606. (4191) Must keep register. Every pawnbroker or junk dealer must keep a register, in which must be entered a description of every

article pawned to him or purchased by him, with the date of the pawning or purchasing, date when the article must be redeemed, with the name of the person by whom the same was pawned, or by whom purchased, and the amount loaned thereon or paid therefor; and in case of the sale of any article pawned or pledged, the pawnbroker or junk dealer must enter upon said register the name of the purchaser, the time of the sale, and the price paid therefor; and the register must always be open to inspection and examination of any peace officer or other persons.

History: En. in substance as one of Secs. 1 to 8, pp. 206-207, L. 1889; amd. Sec. 3315, Pol. C. 1895; re-en. Sec. 2110, Rev. C. 1907; re-en. Sec. 4191, R. C. M. 1921.

Cross-Reference

Register, duties, secs. 94-3702, 94-3704.

66-1607. (4192) **Penalties.** The penalties for a violation of any of the provisions of this chapter are provided for in sections 94-3701 to 94-3704.

History: En. in substance as one of Secs. 1 to 8, pp. 206-207, L. 1889; amd. Sec. 3316, Pol. C. 1895; re-en. Sec. 2111, Rev. C. 1907; re-en. Sec. 4192, R. C. M.

CHAPTER 17

PHOTOGRAPHY—REGULATION

(Unconstitutional—State v. Gleason, 128 M 485, 277 P 2d 530)

66-1701 to 66-1714. Unconstitutional.

Unconstitutional

Chapter 37 of Laws 1937 (66-1701 to 66-1714) known as the Photographic Examiners Act declared unconstitutional as violative of sections 3 and 27 of Article 3

of the Montana Constitution and section 1 of the 14th Amendment to the Constitution of the United States. State v. Gleason, 128 M 485, 277 P 2d 530.

CHAPTER 18

PUBLIC ACCOUNTANTS-REGULATION

Section 66-1801. Certificate of certified public accountants—when granted.

66-1802. Admission of certified public accountants from other states.

Board of examiners in accountancy—appointment—term. 66-1803.

66-1804. Rules and regulations to be prescribed by university.

66-1805. Time of examinations-notice.

Fee for examination and certificate-re-examination. 66-1806.

Cancellation of certificate—grounds—hearing—investigations. False statements by accountants—misdemeanor—penalty. Annual license fee—declaration of university. 66-1807.

66-1808.

66-1809.

Unauthorized practice as certified public accountant—penalty—
"public accountant" and "certified public accountant" defined. 66-1810.

66-1811. Priorly issued certificates not affected.
66-1812. Disposition of funds—expenses of board, how paid.

66-1801. (3241.1) Certificate of certified public accountants—when granted. The certificate of "certified public accountant" shall be granted by the state university of Montana (hereinafter referred to as the university) to any person who is (a) a citizen of the United States or who has duly declared his or her intention of becoming such citizen, and who is and has been a resident of the state of Montana for at least one (1) year prior to the date of his application, and (b) who is over the age of twenty-one (21) years, and (c) who is of good moral character, and (d) who is a graduate of a high school with a four (4) years' course or has had an equivalent education, or who, in the opinion of the board, has had sufficient commercial experience in accounting so that, in the judgment of the board, the requirement of a four-year high school course or equivalent education may be waived, and (e) who shall have successfully passed examinations in the theory and practice of general accounting, in auditing, in commercial law as affecting accountancy, and in such other related subjects as the board of accountancy may deem advisable.

History: En. Sec. 1, Ch. 46, L. 1933; amd. Sec. 1, Ch. 90, L. 1935; amd. Sec. 1, Ch. 106, L. 1937.

Collateral References Licenses 20. 53 C.J.S. Licenses § 33 et seq.

66-1802. (3241.2) Admission of certified public accountants from other states. Every person who is a citizen of the United States or who has bona fide declared his intention to become a citizen of the United States, who has been a resident of the state of Montana at least one year, and who is the holder of a valid certificate as certified public accountant, issued by another state where the requirements entitling him to practice as such certified public accountant are substantially equivalent to those of this state, may be admitted to practice as a certified public accountant in this state upon the production of his certificate and satisfactory evidence of good moral character; but the university may examine the applicant as to his qualifications, and if it finds the applicant qualified, it may issue a certificate in such form as to clearly indicate the conditions under which the same was issued.

History: En. Sec. 2, Ch. 46, L. 1933; amd. Sec. 2, Ch. 90, L. 1935.

Collateral References Licenses \$\infty 22. 53 C.J.S. Licenses \$ 39.

References

Roberts v. Hosking, 95 M 562, 563, 28 P 2d 199.

66-1803. (3241.3) Board of examiners in accountancy—appointment—term. For the purpose of determining the qualifications of persons applying for examination, under the provisions of section 66-1801, the state board of education shall appoint a board of examiners in accountancy, consisting of three members, each of whom shall possess a certificate as certified public accountant issued under the authority of this act. The members first appointed on the board hereunder shall hold their offices until July 1st, 1935. The members subsequently appointed on the board shall hold their offices for the period of one year, and until their successors are appointed and qualified.

History: En. Sec. 3, Ch. 46, L. 1933; amd. Sec. 3, Ch. 90, L. 1935.

66-1804. (3241.4) Rules and regulations to be prescribed by university. The university shall prescribe all useful and necessary rules and regulations for the conduct, character and scope of the examinations, the methods and time of filing applications therefor, and all other rules and regulations necessary or proper, fully to carry into effect the purposes of this act.

History: En. Sec. 4, Ch. 46, L. 1933.

66-1805. (3241.5) Time of examinations—notice. The board of examiners in accountancy shall hold examinations at the university at Missoula. Montana, or at the state capitol, in Helena, Montana, as often as in the opinion of the university shall be necessary, but in no event less frequently than once each year. Thirty days' notice of the time and place of holding such examination shall be given by advertisement published once a week for three successive weeks prior to the date thereof, in three daily newspapers, no two of which shall be published in the same county.

History: En. Sec. 5, Ch. 46, L. 1933.

(3241.6) Fee for examination and certificate—re-examination. The university shall be entitled to receive for the examination and certificate, provided for in section 66-1801, a fee of thirty dollars, (\$30.00), payable in advance at the time of making application therefor. Any applicant who shall fail to pass an examination shall be entitled to further examinations within the next two (2) succeeding years following such failure, but at such times only as the board of accountancy shall hold the regular examination, prescribed in section 66-1805. Such applicant shall not be entitled to more than one (1) examination in each year, providing, that for each additional section of each additional examination, after the failure of such applicant to pass, a fee of five dollars (\$5.00) shall be paid by said applicant for each additional section of each such additional examination.

History: En. Sec. 6, Ch. 46, L. 1933; amd. Sec. 1, Ch. 129, L. 1959.

66-1807. (3241.7) Cancellation of certificate —grounds — hearing—investigations. The university may cancel any certificate issued under the provisions of this act for unprofessional conduct or other sufficient cause; provided, that written notice shall have been forwarded by registered mail at least twenty days prior to any hearing thereon, addressed to the holder of such certificate at his last known address, and appointing a date for a full hearing thereon by the university; and provided, further, that no certificate shall be revoked until after a hearing shall have been had. The university shall establish such rules and regulations for the conduct of such hearings as to it may appear necessary and proper, and in its discretion may appoint a commission of disinterested persons to take evidence and prepare and submit findings and recommendations.

History: En. Sec. 7, Ch. 46, L. 1933.

Collateral References

Licenses € 38. 53 C.J.S. Licenses § 44.

10 Am. Jur. 518, Certified Public Accountants, § 3.

Regulation of public accountants. 70 ALR 2d 433.

66-1808. (3241.8) False statements by accountants — misdemeanor penalty. Any person practicing as an "accountant," "public accountant," "auditor," or "certified public accountant," in this state, who, because of negligence, gross inefficiency, or willfulness, shall issue, or permit the issuance of any false statement of the financial transactions, standing or condition of any corporation, partnership, or individual business undertaking, shall be deemed guilty of a misdemeanor and upon conviction thereof shall

be fined not less than five hundred dollars nor more than two thousand dollars, or imprisoned for a period of not less than ninety days nor more than one year, or subjected to both said fine and imprisonment, in the discretion of the court.

History: En. Sec. 8, Ch. 46, L. 1933.

Collateral References Licenses € 40. 53 C.J.S. Licenses § 66.

66-1809. (3241.9) Annual license fee—declaration of university. On application by the holder of a certificate of "certified public accountant," issued under the laws of this state, on or before December 31st of each year, filed with the university, together with the payment of an annual license fee of five dollars, the applicant's name shall be registered by the university and included in a declaration, which shall be issued annually by the university, containing a copy of this law and an alphabetical list of such accountants as have so registered, their certificate numbers and their addresses, but nothing in this section contained shall operate to cancel any certificate of any certified accountant otherwise in good standing.

History: En. Sec. 9, Ch. 46, L. 1933.

53 C.J.S. Licenses § 46.

Collateral References
Licenses 28 et seq.

Registration fees and licenses, regulation. 70 ALR 2d 456.

66-1810. (3241.10) Unauthorized practice as certified public accountant -penalty-"public accountant" and "certified public accountant" defined. Any person who shall represent himself as having received a certificate, as provided in this act, or under the provisions of chapter 231, of the Revised Codes of Montana, 1921, or who shall offer to or attempt to practice as a certified public accountant, or chartered accountant, or who shall employ the abbreviation "C. P. A." or "C. A.," or any similar words or letters to indicate that he is a certified public accountant, or chartered accountant, without having been granted a certificate as such by the university or under the laws of another state; or who, having received a certificate as certified public accountant under the laws of this or another state, shall have lost the same by revocation or annulment and who shall continue to practice as a certified public accountant, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than two hundred and fifty dollars nor more than one thousand dollars, or imprisoned for a period of not less than ninety days nor more than one year, or subjected to both said fine and imprisonment, in the discretion of the court.

A "public accountant" is one who offers his services professionally for pay to the general public; and a "certified public accountant" is one who shall have received a certificate as such under this law or prior laws of the state of Montana, or some other state.

History: En. Sec. 10, Ch. 46, L. 1933. NOTE.—Chapter 231, referred to above, was sections 3241-3251 of the 1921 code. They were repealed by Ch. 46, Laws 1933 (sections 66-1801 to 66-1812 of this code). Collateral References Licenses \$40. 53 C.J.S. Licenses \$66.

Failure of accountant to procure license as affecting validity or enforceability of contracts. 118 ALR 651.

66-1811. (3241.11) Priorly issued certificates not affected. Provided. however, that nothing in this act contained shall nullify, invalidate or otherwise affect any certificate as certified public accountant heretofore issued by the university under the provisions of prior acts.

History: En. Sec. 11, Ch. 46, L. 1933.

Collateral References

Licenses \$\sim 8. 53 C.J.S. Licenses & 13.

(3241.12) Disposition of funds—expenses of board, how paid. All funds received under this act, or under or by virtue of prior accountancy laws shall be received by the university and paid into the board of accountancy fund.

The members of the board of examiners in accountancy shall receive their actual traveling and hotel expenses incurred while engaged in the performance of their duties, as imposed upon them by this act, but shall receive no other compensation. Such expenses, together with the expense of preparing and issuing certificates, publishing notices of examinations, and all other expenses arising from the administration of this act shall be paid by the university from the fees received from applicants. In no event shall any expenses arising from the administration of this act become a charge against the funds of the university or the state of Montana.

History: En. Sec. 12. Ch. 46. L. 1933.

Collateral References

Licenses € 33.

53 C.J.S. Licenses § 56.

CHAPTER 19

REAL ESTATE BROKERS-REGULATION-REAL ESTATE COMMISSIONER

Section 66-1901. Office of real estate commissioner created.

66-1902. Powers of commissioner. 66-1903. Real estate broker define

Real estate broker defined.

66-1904. Agreements respecting oil operations.

66-1905. License of real estate broker. 66-1906. Disposal of fees and collections.

66-1907. Seal of commissioner—records as evidence.

Duties of attorney general. 66-1908.

66-1909. Scope of licenses.

66-1910. License-application-bond-issuance-fee.

Salesman's license. 66-1911.

66-1912. Bonds—approval—action upon. 66-1913. Consent to suit by nonresident

Consent to suit by nonresident applicants.

Home office of real estate brokers. 66-1914. 66-1915. Suspension or revocation of license.

66-1916. Suspension or revocation—appeal and bond.

66-1917. Power of commissioner concerning hearings, oaths, subpoenas, process and witnesses.

66-1918. Complaints for violation of act—duty of county attorney.

Penalty for acting without license.

Proof of license in actions for compensation. 66-1919.

66-1920.

Notice of termination of employment of broker. 66-1921.

Mailing list of licensed brokers. 66-1922.

66-1923. Effect of partial invalidity of act.

66-1901. (4056) Office of real estate commissioner created. The commissioner of agriculture of the department of agriculture, labor and industry, of the state of Montana, shall be ex officio real estate commissioner, with no additional compensation and shall be charged with the duty of enforcing the provisions of this chapter, and all other laws of the state, now or hereafter, enacted for the regulation of real estate brokers.

History: En. Sec. 1, Ch. 195, L. 1921; re-en. Sec. 4056, R. C. M. 1921; amd. Sec. 1, Ch. 40, L. 1925.

NOTE.—The title of commissioner of agriculture, labor and industry as used in this section now refers to the commissioner of agriculture, see sec. 3-101.1.

References

Piatt & Heath Co. v. Wilmer, 87 M 382, 288 P 1021.

Collateral References

Agriculture 2.

66-1902. (4057) **Powers of commissioner.** The state real estate commissioner, hereinafter referred to as the "commissioner," shall have full power to issue licenses to real estate brokers, and to make reasonable rules and regulations respecting the granting and suspension of the same, and to perform all other acts and duties necessary under the provisions of this act.

History: En. Sec. 2, Ch. 195, L. 1921; re-en. Sec. 4057, R. C. M. 1921.

Collateral References

Brokers. 3.
12 C.J.S. Brokers § 8.
8 Am. Jur. 993, Brokers, § 7 et seq.

66-1903. (4058) Real estate broker defined. A "real estate broker," within the meaning of this act, is a person who for a compensation, or promise thereof, sells or offers for sale, buys or offers to buy, lists or solicits for prospective purchasers, receives or demands an advance fee, negotiates, or offers to negotiate, either directly or indirectly, whether as the employee of another or otherwise, the purchase, sale, exchange of real estate, or any interest therein, for others, as a whole or partial vocation. The word "person" as used in this act, shall be construed to mean and include a corporation. The term "advance fee" as used in this act is a fee contracted for, claimed, demanded, charged, received or collected for a listing, advertisement or offer to sell or lease property in a publication issued primarily for the purpose of promoting the sale or lease of business opportunities or real estate or for referral to real estate brokers or salesmen, other than a newspaper of general circulation, prior to the printing thereof. The provisions of this act shall not apply to any person who purchases property for his own use or account, nor to any person, who, being the owner of property, sells, exchanges, or otherwise disposes of the same for his own account, nor to any person holding a duly executed power of attorney written in a separate instrument designated as such, from the owner granting power to consummate the sale, exchange or leasing of real estate, nor to the services rendered by an attorney at law for or on behalf of his client, nor to any receiver, trustee in bankruptcy, guardian, administrator, or executor, nor to any person acting under the order of the court, nor to any person selling under a deed of trust.

History: En. Sec. 3, Ch. 195, L. 1921; re-en. Sec. 4058, R. C. M. 1921; amd. Sec. 1, Ch. 7, L. 1933; amd. Sec. 1, Ch. 129, L. 1957.

Advertising Not Dealing

Advertising for purpose of bringing buyers and sellers together is not a dealing in real estate for license purposes.

Union Interchange, Inc. v. Parker, — M —, 357 P 2d 339, 346.

Deal Held Not Option but Sale Entitling Broker to Commission

Where owner left deed to real property with broker under agreement to pay him 5% commission if he found a party ready, able and willing to purchase on terms

acceptable to owner, and broker produced a prospective purchaser who agreed to forfeit \$200 down payment if by a specified date he failed to meet the major portion of the purchase price, which proposal the owner and his wife accepted in writing with the payment, and the purchaser padlocked the premises, held, that the transaction was a sale and not a mere option, and the broker was entitled to his commission. Anderson v. Craig, 111 M 182, 187, 108 P 2d 205.

Isolated Transactions

The provision of section 66-1920, that one acting in the capacity of a real estate broker cannot maintain an action for compensation unless he alleges and proves that at the time the cause of action arose he was duly licensed to act as a broker, has no application, under this section, to one who acts in that capacity in connection with a single transaction only. Harbolt v. Hensen, 78 M 228, 233, 253 P 257.

Evidence that a broker's contract was written on plaintiff's stationery showing his name and the legend "Real Estate" and his statement at the trial that he never "deducted a mortgage on a commission" held too unsubstantial to warrant a finding that at the time the transaction in question took place he was a broker within the meaning of this section. Harbolt v. Hensen, 78 M 228, 233, 253 P 257.

Questions of Law

The determination whether plaintiff was doing business in Montana within the purview of section 15-1701 or was carrying on

the business of a real estate broker within the purview of this section, were questions of law under section 93-2501-2. Union Interchange, Inc. v. Parker, — M.—, 357 P 2d 339, 343.

Collateral References

8 Am. Jur. 989, Brokers, § 2.

Effect of statement of real estate broker to prospective purchaser that property may be bought for less than list price as breach of duty to vendor. 17 ALR 2d 904.

Duty of real estate broker to disclose that prospective purchaser is a relative. 26 ALR 2d 1307.

Payment to broker authorized to sell real property as payment to principal. 30 ALR 2d 805.

Power of real estate broker to execute contract of sale in behalf of principal. 43 ALR 2d 1014.

Liability of real estate broker or agent representing both parties to purchaser or prospect for misrepresenting or concealing offer or acceptance. 55 ALR 2d 363.

Power of real estate broker to bind principal by representations as to character, condition, location, quantity, or title of property. 58 ALR 2d 10.

Liability of real estate broker for acceptance of note, check, or property, rather than eash, as earnest money. 59 ALR 2d 1455.

Misrepresentation as basis of real estate broker's liability for damages or losses sustained by vendor responsible to vendee on account thereof. 61 ALR 2d 1237.

66-1904. (4059) Agreements respecting oil operations. Agreements of every kind respecting prospecting, drilling or operating land for oil, or disposing of the oil or oil mining rights therein, whether upon a royalty basis or otherwise, shall be deemed dealing in real estate.

History: En. Sec. 4, Ch. 195, L. 1921; re-en. Sec. 4059, R. C. M. 1921.

66-1905. (4060) License of real estate broker. It shall be unlawful for any person to engage in the business, or act in the capacity of, real estate broker within this state, without first obtaining a license therefor.

History: En. Sec. 5, Ch. 195, L. 1921; re-en. Sec. 4060, R. C. M. 1921.

Collateral References

8 Am. Jur. 994, Brokers, §§ 8 et seq.

Failure to procure license as affecting validity or enforceability of contract. 30 ALR 834; 42 ALR 1226 and 118 ALR 646.

Who is real estate broker within license statute. 56 ALR 480 and 167 ALR 774.

66-1906. (4061) Disposal of fees and collections. All fees and collections paid to the commissioner by any person, under the provisions of this act, shall be by him paid to the state treasurer on the tenth and twenty-

fifth days of each calendar month, and shall be placed by the state treasurer in the general fund of the state of Montana.

History: En. Sec. 6, Ch. 195, L. 1921; re-en. Sec. 4061, R. C. M. 1921; amd. Sec. 2, Ch. 40, L. 1925.

66-1907. (4062) Seal of commissioner—records as evidence. The commissioner shall adopt a seal with the words "real estate commissioner, state of Montana," and such other device as the commissioner shall approve engraved thereon, by which he shall authenticate the proceedings of his office. Copies of all records and papers in the office of the commission certified to be a true copy under the hand and seal of the commissioner, shall be received in evidence in all cases equally and with like effect as the originals.

History: En. Sec. 7, Ch. 195, L. 1921; re-en. Sec. 4062, R. C. M. 1921.

66-1908. (4063) Duties of attorney general. The attorney general shall render to the commissioner opinions upon all questions of law relating to the construction or interpretation of this act, or arising in the administration thereof, that may be submitted to him by the commissioner, and shall act as attorney for the commissioner in all actions and proceedings brought by or against him under or pursuant to any of the provisions of this act.

History: En. Sec. 8, Ch. 195, L. 1921; re-en. Sec. 4063, R. C. M. 1921.

Collateral References
Attorney General ≈ 6.
7 C.J.S. Attorney General §§ 5, 6.

66-1909. (4064) Scope of licenses. No license issued by the commissioner shall authorize any person other than him to whom the license shall be issued to act as a real estate broker. Whenever a license is issued to a corporation, it shall entitle the corporation officers, not to exceed three, designated in the application for the license, to act in the capacity of real estate broker, in behalf of the corporation; and whenever a license is issued to a copartnership it shall entitle the members of the copartnership named by the copartnership in its application for the license, to act in behalf of the copartnership in the capacity of real estate broker.

History: En. Sec. 9, Ch. 195, L. 1921; re-en. Sec. 4064, R. C. M. 1921.

Collateral References Brokers € 5. 12 C.J.S. Brokers § 8.

66-1910. (4065) License — application — bond — issuance — fee. Any person, copartnership, or corporation, desiring to carry on the business of real estate broker in this state shall make application for a license so to do upon a form prescribed by the commissioner, and shall file the same with the commissioner; when an individual makes the application, in the application shall be stated the full name of the applicant, and his business address, which shall be the place where he maintains his home office. The applicant shall file with the application a written recommendation, signed by at least five (5) responsible freeholders of the county in which the home office of the applicant is, in which the freeholders must certify that they believe the applicant to be a man of good moral character, and in their judgment well qualified to carry on the business of real estate broker.

The applicant shall also file with his application a good and sufficient bond in the sum of five thousand dollars (\$5,000.00), conditioned that the applicant shall conduct his business as real estate broker in accordance with the requirements of this act, provided that the total aggregate liability of any surety under such bond shall not exceed the face amount of the bond.

When a copartnership makes application for a license it shall state in the application the full name of all the partners, their business addresses, the place where the principal office shall be maintained, and the commissioner shall require a recommendation, signed by at least five (5) responsible freeholders of the county in which the home office of the copartnership is, in which the freeholders must certify that they believe that each of the members of said copartnership is a man of good moral character and in their judgment well qualified to carry on the business of real estate broker. The copartnership shall also file with their application a good and sufficient bond in the sum of five thousand dollars (\$5,000.00), conditioned that the copartnership shall conduct their business as real estate brokers in accordance with the requirements of this act.

An unincorporated association shall comply with the rules prescribed for a copartnership.

When a corporation makes application for a license, it shall state in its application a list of its officers and directors, and their addresses, its principal place of business in this state, which shall be deemed its home office, and the names of the officers for whom a license is asked; the commissioner shall require its filing of a recommendation for each of said officers as in the case of an individual applicant, a good and sufficient bond in the sum of five thousand dollars (\$5,000.00), conditioned that the corporation shall conduct its business as a real estate broker in accordance with the requirements of this act, provided that the total aggregate liability of any surety under such bond shall not exceed the face amount of the bond.

The commissioner may require such other proof as he may deem advisable as to the honesty, truthfulness and good reputation of any applicant for a license, whether an individual or member of a copartnership or officer of a corporation, before issuing the license; provided, however, that if a real estate broker has once been licensed under this act, upon his application for a renewal of his license, the commissioner may, in his discretion, waive the filing of new recommendations or references.

Upon the filing of the application, if the same be accompanied with a proper recommendation or recommendations, bond or bonds, and fee hereinafter specified, if the commissioner is satisfied with the showing made, he shall forthwith issue the license, which shall continue thenceforward, unless revoked, until the first day of April next ensuing. If the commissioner shall not be satisfied with the showing made by the applicant, or if the necessary bond or bonds, satisfactory to the commissioner be not given, he may refuse to issue the license, in which case the applicant must appear before the commissioner within the time and manner provided in this act whenever a license application is refused, canceled, or revoked.

For every real estate broker's license issued, the commissioner shall require, before issuance, a fee of ten dollars (\$10.00), provided, that if a

license be taken out after the first day of October, but one-half the fee shall be required, but the license shall expire on the first day of April following, and in case of licenses issued to copartnerships, unincorporated associations, and corporations, he shall require such fee for each such copartnership, unincorporated association, or corporation to whom such license is issued.

History: En. Sec. 10, Ch. 195, L. 1921; re-en. Sec. 4065, R. C. M. 1921; amd. Sec. 1, Ch. 150, L. 1953; amd. Sec. 1, Ch. 130, L. 1957. Collateral References

Brokers € 3, 4. 12 C.J.S. Brokers § § 8, 9.

Character and extent of liability on real estate broker's statutory bond. 17 ALR 2d 1012.

References

Union Interchange, Inc. v. Parker, — M ___, 357 P 2d 339, 341.

66-1911. (4066) Salesman's license. The commissioner may issue a license to a person who acts as an agent for a duly licensed real estate broker, and who shall be designated as a salesman; the license shall be issued to him as a real estate broker (salesman). An applicant for a salesman's license shall comply in every respect with the rules and regulations provided for real estate brokers, except that he need not himself maintain a fixed place of business, but he must designate as his home office the office of a regularly licensed real estate broker, and must not change his home office without the commissioner's permission. A salesman shall pay an annual fee of five dollars, which shall accompany his application for a license, which license shall also expire on the first of April following.

History: En. Sec. 11, Ch. 195, L. 1921; re-en. Sec. 4066, R. C. M. 1921.

66-1912. (4067) Bonds—approval—action upon. All bonds given under the provisions of this act shall run to the state of Montana, shall be approved by the commissioner and be filed in his office. Any person who may be damaged by the wrongful acts of a real estate broker shall, in addition to the other legal remedies, have a right of action on the broker's or salesman's bond.

A person having a right of action against an agent acting in the scope of his authority shall have a right of action not only against the agent but also against the principal, and the principal's bond shall be liable for the acts of his agent.

History: En. Sec. 12, Ch. 195, L. 1921; re-en. Sec. 4067, R. C. M. 1921.

66-1913. (4068) Consent to suit by nonresident applicants. If an applicant be a nonresident of this state, he shall file an irrevocable consent that suits and actions may be commenced against him in any county of this state in which the plaintiff having a cause of action or suit may reside, and that service of any process or pleadings in said suit or action may be made by delivering same to the state insurance commissioner. Such service when so made to be taken and held in all courts to be as valid and binding upon the applicant as if in fact made upon said applicant in this state within the jurisdiction of the court in which said suit or action is filed; said "irrevocable consent" shall be in a form prescribed by the commissioner, shall be acknowledged before a notary public and if the applicant be a corporation

said consent shall be accompanied by a duly certified copy of the resolutions of the board of directors of such corporation authorizing the execution of the same; any process or pleading above-mentioned so served upon the state insurance commissioner shall be served in duplicate copies, one of which shall be filed in the office of the state insurance commissioner, and the other immediately forwarded by registered mail to the office of the applicant named in his application and service shall be deemed to have been made upon said applicant on the third day following the deposit in the mail of said copy of said process or pleadings.

History: En. Sec. 13, Ch. 195, L. 1921; re-en. Sec. 4068, R. C. M. 1921.

Request for Time to Plead

The request for additional time by one defendant in which to plead, pending the determination of motion for change of venue by two other defendants does not constitute a waiver. Young v. Savage, 137 M 174, 351 P 2d 227, 229.

Venue of Action against Nonresident

The nonresident defendant may be sued in any county of Montana in which the plaintiff resides, but the other two defendants, appearing separately by motion for change of venue, have the right to have the venue changed under the complaint. Young v. Savage, 137 M 174, 351 P 2d 227, 229.

66-1914. (4069) Home office of real estate brokers. Each person, corporation, or copartnership licensed to act as real estate broker shall be required to maintain a definite place of business in the state of Montana, which shall serve as his or its home office. In the home office shall be displayed constantly, in a conspicuous place, the license, and if a salesman be employed his license shall likewise be displayed. If any person, copartnership, association or corporation shall establish or maintain any office or place of business in addition to his or its principal place of business, then upon application to the commissioner, he shall, upon the payment of a fee of one dollar for each duplicate, issue a duplicate of said license for each additional office, which duplicate shall at all times be displayed in said additional office in like manner as the original, and each copy shall be plainly marked "duplicate" by the commissioner. Upon the issuance of a license to any real estate broker or to a salesman, the commissioner shall issue to the broker or salesman a pocket card of convenient size reciting that the broker is licensed to act as a real estate broker, or a real estate broker (salesman), for a stated period, showing the business address of the broker, or salesman, which card shall be signed and sealed by the commissioner. Notice in writing shall be given the commissioner of any change of business location, whereupon the commissioner shall issue a new license and pocket card covering the new business address, without charge: provided that the license previously issued, together with the pocket card shall be taken up by the commissioner before issuing the new one. A change of business location without notification to the commissioner shall automatically cancel the license heretofore issued.

It shall be unlawful for any licensed real estate broker or real estate broker (salesman) to pay any part or share of a commission or other compensation received by him in his capacity as a real estate broker, or real estate broker (salesman) to any person who is not duly licensed under the provisions of this act, except to brokers in other states or countries.

History: En. Sec. 14, Ch. 195, L. 1921; re-en. Sec. 4069, R. C. M. 1921.

- 66-1915. (4070) Suspension or revocation of license. The commissioner may, upon his own motion, and shall, upon verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate broker or salesman within this state, and shall have the power to suspend or revoke licenses issued under the provisions of this act at any time where the holder thereof in performing or attempting to perform any of the acts mentioned in section 66-1903 of this code is guilty of:
 - (a) Making any substantial misrepresentations, or
- (b) A continued or flagrant course of misrepresentation or making of false promises, whether through agents or salesmen, or otherwise; or
- (c) Failure to account for or remit for any property or moneys coming into his possession which belong to another; or
- (d) Any other conduct whether of the same or a different character than hereinbefore specified which constitutes dishonest dealing.

History: En. Sec. 15, Ch. 195, L. 1921; re-en. Sec. 4070, R. C. M. 1921.

Misrepresentation

Misrepresentation as to the acreage of a tract offered by a broker is not in itself sufficient ground for cancellation of a license where the acreage stated was that stated by the landowner, the broker had no reason to believe that the acreage stated was incorrect, and the prospective purchaser had been over the tract and was not deceived by the misrepresentation. Meyer v. Unroe, — M —, 362 P 2d 218.

Collateral References

Grounds for revocation or suspension of license of real estate broker or salesman, 56 ALR 2d 573.

(4071) Suspension or revocation—appeal and bond. If the commissioner, after a hearing as provided in this act, shall refuse to grant an application for a license or shall cancel or revoke a broker's or salesman's license and the broker or salesman shall feel aggrieved by the decision of the commissioner, he may appeal to the district court of the county in which he has his principal place of business by giving notice of such appeal in writing to the commissioner and filing a bond with the clerk of the district court in the sum of three hundred dollars (\$300.00) to be approved by the judge of said court, conditioned to pay all costs that may be awarded against such appellant in the event of an adverse decision, said bond and notice to be filed within ten (10) days from the date of the commissioner's decision. The filing of such notice and bond shall supersede the order of the commissioner until the final termination of such appeal. The judge of the court shall summarily hear and determine the questions involved upon said appeal, and shall receive and consider any pertinent evidence whether oral or documentary concerning the matter. If such aggrieved party shall fail to perfect his appeal or file said transcript as herein provided, said stay shall automatically terminate. Appeals from judgment of the district court may be taken to the supreme court in the same manner as appeals are taken in civil actions.

History: En. Sec. 16, Ch. 195, L. 1921; re-en. Sec. 4071, R. C. M. 1921; amd. Sec. 1, Ch. 131, L. 1957.

66-1917. (4072) Power of commissioner concerning hearings, oaths, subpoenas, process and witnesses. The commissioner shall, before deny-

ing the application for a license or before canceling or revoking any license, set the matter down for a hearing and, at least ten (10) days prior to the date set for the hearing, shall notify the applicant or licensee in writing, which notice shall contain an exact statement of the charges made and the date and place of the hearing and shall afford the applicant or licensee an opportunity to be heard in person or by an attorney in reference thereto. The written notice may be served by delivering it personally to the applicant or licensee, or by mailing it by registered mail to the last known business address of the applicant or licensee. If the applicant or licensee is a salesman the commissioner also shall notify the broker employing him or in whose employ he is about to enter by mailing notice by registered mail to the broker's last known business address. The hearing on such charges shall be held before the commissioner at such time and place as the commissioner shall prescribe, and the hearing may be continued from time to time. The commissioner shall have power to administer oaths, certify to all official acts and shall have power to subpoena and bring before him any person in this state as a witness, compel the production of books and papers, and take the testimony of any person by deposition in the same manner as is prescribed by law in the procedure of the district courts of this state in civil cases. Process issued by the commissioner shall extend to all parts of the state and may be served by any person authorized to serve process. Each witness who shall appear by order of the commissioner shall receive for his attendance the same fees and mileage allowed by law to a witness in civil cases appearing in the district court, which amount shall be paid by the party at whose request such witness is subpoenced. When any witness who has not been required to attend at the request of any party shall be subpoenaed by the commissioner, his fees and mileage shall be paid in the same manner as other expenses of said department are paid.

History: En. Sec. 17, Ch. 195, L. 1921; re-en. Sec. 4072, R. C. M. 1921; amd. Sec. 1, Ch. 132, L. 1957.

66-1918. (4073) Complaints for violation of act—duty of county attorney. The commissioner may prefer a complaint for violation of any section of this act before any court of competent jurisdiction. It shall be the duty of the county attorney of each county in the state to prosecute all violations of the aforesaid provisions of this act in their respective counties in which such violations occur.

History: En. Sec. 18, Ch. 195, L. 1921; re-en. Sec. 4073, R. C. M. 1921.

Brokers 5.
12 C.J.S. Brokers § 10.

66-1919. (4074) Penalty for acting without license. Any person or corporation acting as a real estate broker or real estate broker (salesman) within the meaning of this act without a license as herein provided, shall, upon conviction thereof, be punished by a fine of not to exceed six hundred dollars.

History: En. Sec. 19, Ch. 195, L. 1921; re-en. Sec. 4074, R. C. M. 1921.

66-1920. (4075) Proof of license in actions for compensation. No person, copartnership, association, or corporation, engaged in the business of, or acting in the capacity of a real estate broker, or salesman within this state shall maintain any action in any of the courts of this state to recover compensation for his services alleged to be earned as a real estate broker, or salesman, without alleging and proving that such person, copartnership, association, or corporation was duly licensed under the provisions of this act at the time the alleged cause of action arose.

History: En. Sec. 20, Ch. 195, L. 1921; re-en. Sec. 4075, R. C. M. 1921.

Operation and Effect

The provision of this section that one acting in the capacity of a real estate broker cannot maintain an action for compensation unless he alleges and proves that at the time the cause of action arose he was duly licensed to act as a broker, has no application, under section 66-1903, to one who acts in that capacity in connection with a single transaction only. Harbolt v. Hensen, 78 M 228, 233, 253 P

Waiver

One who is not a real estate broker within the meaning of this section to enable him to recover commissions on a sale procured by him is not required to allege and prove that at the time he was not a broker; if he was a broker it was incumbent upon the defendant to so allege and prove, and by failing to do so he waived the point. Harbolt v. Hensen, 78 M 228, 233, 253 P 257.

Where a defect in the complaint affects only the capacity of plaintiff to sue, as where a real estate broker in an action to recover commissions does not allege that he was duly licensed to act as a broker, such allegation being made a condition precedent to his maintaining the action (this section), defendant by failing to take advantage thereof by special demurrer or answer, waives it, a general

demurrer not reaching the point, and may not for the first time raise it on appeal. Piatt & Heath Co. v. Wilmer, 87 M 382, 386, 288 P 1021.

References

Union Interchange, Inc. v. Parker, -M ___, 357 P 2d 339, 341.

Collateral References

Brokers \$2(4). 12 C.J.S. Brokers § 110.

Effect of statement of real estate broker to prospective purchaser that property may be bought for less than list price as breach of duty to vendor, so as to bar claim for commission. 17 ALR 2d 904.

Broker's right to commission on sales consummated after termination of em-ployment. 27 ALR 2d 1348.

Amount of commission recoverable by broker where owner sells property to broker's customer at less than stipulated price. 46 ALR 2d 885.

Sale of part of property, broker's right to commission. 47 ALR 2d 680.

Broker's return of deposit to purchaser as waiver of right to demand commission from seller. 69 ALR 2d 1244.

Right to commission as affected by failure or refusal of customer (prospect) to comply with valid contract. 74 ALR 2d 437.

Broker's right to commission on sale rejected by principal because of buyer's fraud or misrepresentation. 79 ALR 2d

(4076) Notice of termination of employment of broker. Upon the termination of the employment of any real estate broker acting in the capacity of a salesman, a written statement of the facts, in reference thereto, shall be filed forthwith, by the employer, with the commissioner.

History: En. Sec. 21, Ch. 195, L. 1921; re-en. Sec. 4076, R. C. M. 1921.

(4077) Mailing list of licensed brokers. The commissioner shall at least annually mail to each person licensed under the provisions of this act, a list of the names and addresses of all licensed brokers in this state.

History: En. Sec. 22, Ch. 195, L. 1921; re-en. Sec. 4077, R. C. M. 1921.

66-1923. (4078) Effect of partial invalidity of act. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional or inoperative, such decision shall not affect the validity of the remaining portions of this act.

History: En. Sec. 23, Ch. 195, L. 1921; re-en. Sec. 4078, R. C. M. 1921.

Collateral References Statutes € 54(8). 82 C.J.S. Statutes § 109 et seq.

CHAPTER 20

STOCKBROKERS AND INVESTMENT COMPANIES (BLUE SKY LAW)

(Repealed—Section 28, Chapter 251, Laws 1961)

66-2001 to **66-2026**. (4026 to 4050, 4053) Repealed—Chapter **251**, Laws of 1961.

Repeal

These sections (Secs. 1 to 24, Ch. 85, L. 1913; Sec. 1, Ch. 85, L. 1921; Secs. 1 to 5, Ch. 179, L. 1929; Secs. 1 to 3, Ch. 194, L. 1931; Secs. 1 to 8, Ch. 47, L. 1933; Sec. 1, Ch. 120, L. 1937; Sec. 1, Ch. 175, L. 1947; Secs. 1 to 6, Ch. 178, L. 1957), relating to stockbrokers and investment

companies (Blue Sky Law) were repealed by Sec. 28, Ch. 251, Laws 1961.

New Provisions

For new provisions relating to subject matter previously included in this chapter, see secs. 15-2001 to 15-2025.

CHAPTER 21

TITLE ABSTRACTERS—REGULATION

Section 66-2101. Abstract records and registered abstracter required.

66-2102. Abstracters board of examiners.

66-2103. Organization of board.

66-2104. Compensation of members of board—disposition of funds.

66-2105. Records of board.

66-2106. Reports of board.

66-2107. Registered abstracters defined.

66-2108. Examination of applicants.

66-2109. Registration of abstracters without examination.

66-2110. Certificate of registration—contents and issuance—temporary certificates.

66-2111. Certificate of authority—contents and issuance.

66-2112. No abstract books or indices required under certain conditions.

66-2113. Bond or other securities required.

66-2114. Seal.

66-2115. Regulation of abstracters—violations—appeals.

66-2116. Abstract prima-facie evidence of its contents.

66-2117. Penalty.

66-2118. To whom provisions of this act shall not apply.

66-2119. Compensation of abstracters.

66-2120. Abstract prima-facia evidence of its contents.

66-2101. (4139.1) Abstract records and registered abstracter required. Any person, firm or corporation desiring to engage in or continue the business of making and compiling abstracts of title to real estate within the state of Montana, shall have for use in such business a set of abstract books or other system of indices or records showing in a sufficiently comprehensive form all instruments affecting title to real property on file or of record in the office of the county clerk and recorder of each county wherein they abstract the titles of the lands, lots or tracts of land in said counties or

county, and shall have in charge of such business a registered abstracter, as hereinafter defined, and shall first obtain a certificate of authority, and file and furnish the bond or other securities required, and shall comply with the other requirements herein provided, save and except as may be hereinafter expressly excepted.

History: En. Sec. 1, Ch. 105, L. 1931.

Constitutionality

This section held constitutional in State v. Abstracters Board of Examiners, 99 M 564, 45 P 2d 668.

"Abstract of Title"-Definition

An "abstract of title" is an epitome of the conveyances, transfers and other facts relied upon as evidence of title, together with all such facts appearing of record as may impair the title. State v. Abstracters Board of Examiners, 99 M 564, 577, 45 P 2d 668.

Access to County Records

Denial of application for abstracter certificate was proper where applicant merely

had access to the records of the county. State v. Abstracters Board of Examiners, 99 M 564, 576, 45 P 2d 668.

Records Required

An applicant for abstracter certificate is required to own or control the requisite plant and tract indices prescribed by this chapter. State v. Abstracters Board of Examiners, 99 M 564, 576, 45 P 2d 668.

Collateral References

Abstracts of Title 2.

1 C.J.S. Abstracts of Title § 5.
Generally, see 1 Am. Jur. 155, Abstracts of Title.

66-2102. (4139.2) Abstracters board of examiners. There is hereby created a board to be known as the abstracters board of examiners, to carry out the purposes and enforce the provisions of this article; said board shall consist of three members to be appointed by the governor of the state of Montana, and who shall at all times be registered abstracters as provided in this act, and no two members of said board shall be appointed from the same county. Each member of said board shall serve thereon for a term of three years and until his successor is appointed and qualified, excepting that the first members of said board shall be appointed from abstracters who have been actively engaged in the preparation of abstracts of title to real estate in the state of Montana for at least five years immediately preceding the first day of March, 1931, and who can qualify under section 66-2109, and shall be appointed, one for one year, one for two years, and the other for three years; the term of office to commence on the date this law goes into effect. Each member of said board shall qualify by taking the oath provided by law for public officers; vacancies on said board caused by death, resignation or otherwise shall be filled by appointment by the governor, as above provided.

History: En. Sec. 2, Ch. 105, L. 1931.

66-2103. (4139.3) Organization of board. Said board shall organize by the election of a chairman and a secretary. The secretary may or may not be a member of said board, but shall be a registered abstracter as hereinafter defined and shall be engaged in that business. The board shall have a seal and shall have the power to compel the attendance of witnesses, and the chairman and secretary shall have power to administer oaths. Said board may adopt such rules and regulations as it shall deem necessary for the proper administration of its powers and duties and the carrying out of the purposes of this act.

History: En. Sec. 3, Ch. 105, L. 1931.

66-2104. (4139.4) Compensation of members of board—disposition of funds. Each member of the board shall receive a compensation of five dollars per day for actual services while attending meetings or otherwise engaged upon business connected with the board, and shall receive ten cents per mile for each mile actually traveled, and the further sum of five dollars per day for expenses while absent from home upon business connected with the board, which amount shall be paid upon verified vouchers after allowance by said board out of any funds in the hands of the state treasurer in the abstracters board fund.

And there is hereby established a fund to be known as the abstracters board fund. All fees and moneys received under the provisions of this act shall be deposited with the state treasurer to the credit of the abstracters board fund, to meet the expenses incurred in carrying out the provisions of this act; provided, the expenses of said board shall not exceed the fees collected.

History: En. Sec. 4, Ch. 105, L. 1931.

NOTE.—This section fixing mileage of State Abstracters Board of Examiners at ten cents a mile held impliedly amended by section 59-801 (4884) as amended by Ch. 16, Laws 1933, fixing mileage of officers at seven cents. Opinions of Attorney General, Vol. 15, No. 347. See section 59-801 which has been subsequently amended.

66-2105. (4139.5) Records of board. Said board shall keep a register, wherein it shall enter the names of all applicants for registration, and for certificates of authority, with their place of business and such other information as may be deemed appropriate, including the action taken by said board thereon, and the dates upon which certificates of registration and certificates of authority are issued.

History: En. Sec. 5. Ch. 105, L. 1931.

66-2106. (4139.6) Reports of board. Said board shall make a biennial report to the governor, which report shall contain a full statement of its receipts and disbursements for the preceding biennial term; also a full statement of its doings and proceedings and such recommendations as to it may seem proper for the better carrying out of the intents and purposes of this act, which said report shall not be printed except as the expense of the fund herein provided for.

History: En. Sec. 6, Ch. 105, L. 1931.

66-2107. (4139.7) Registered abstracters defined. Registered abstracters, within the meaning of this act, shall comprise all persons who shall, on the first day of March, 1931, be in charge, either individually or jointly with other persons, of an abstract office which is the holder of a valid and subsisting certificate of authoriy issued by the state treasurer of the state of Montana under the provisions of section 4140 of the Revised Codes of Montana, 1921, and who shall obtain a certificate of registration as hereinafter provided, or persons who shall be granted certificates of registration by the said abstracters board of examiners after the passage of this act.

History: En. Sec. 7, Ch. 105, L. 1931. NOTE.—Section 4140, referred to in this section, was repealed and superseded by Ch. 105, Laws 1931 (sections 66-2101 to 66-2118 of this code).

66-2108. (4139.8) Examination of applicants. Any person desiring to obtain a certificate of registration under this act shall make application to said board therefor and shall pay to the secretary of said board an examination fee of twenty-five dollars, except as hereinafter provided. Such application shall be upon a form to be prepared by said board and to contain such information as may be desired by it. Thereupon said board shall fix a date and place for the examination of such applicant, of which notice shall be given to applicant by mail, who shall present himself at such meeting; whereupon said board shall proceed to examine such applicant or applicants under such rules and regulations as may be by said board prescribed.

History: En. Sec. 8, Ch. 105, L. 1931.

66-2109. (4139.9) Registration of abstracters without examination. Any person, who, on the first day of March, 1931, is in charge, either individually or jointly with other persons, of an abstract office which is the holder of a valid and subsisting certificate of authority issued by the state treasurer of the state of Montana under the provisions of section 4140 of the Revised Codes of Montana, 1921, and who shall make application to the abstracters board of examiners prior to the expiration of said certificate of authority, shall upon the payment of a fee of five dollars, be issued a certificate of registration, without examination, under such rules as may be provided by said board.

History: En. Sec. 9, Ch. 105, L. 1931. NOTE.—See note to Sec. 66-2107.

66-2110. (4139.10) Certificate of registration—contents and issuance—temporary certificates. The certificate of registration issued by said board under the provisions hereof shall recite, among other things, that the holder thereof has complied with the provisions of this act relating to examination or otherwise, and shall entitle the holder of such certificate of registration to take charge of any abstract office in any county in this state holding a certificate of authority under the provisions of this act.

Certificates of registration shall be issued upon the payment of five dollars fee and shall be valid for one year from the date thereof but shall be renewed annually by said board upon application within thirty days prior to the expiration thereof upon a payment of one dollar to the secretary of said board. Said board may issue temporary certificates of registration in their discretion between meetings of said board.

History: En. Sec. 10, Ch. 105, L. 1931.

66-2111. (4139.11) Certificate of authority—contents and issuance. Any person, firm or corporation desiring to obtain a certificate of authority under this act shall make application to said board therefor and shall pay to the secretary of said board an application fee of five dollars. Such application shall be upon a form to be prepared by said board and to contain such information as may be desired by it.

Every person, firm or corporation, who shall furnish satisfactory proof to said board that applicant has for use in such business a set of abstract books or other system of indices and shall have in charge of such business a registered abstracter as provided for in section 66-2101, and shall fur-

nish the bond, or other securities, and pay the application fee herein provided, shall be entitled, upon compliance with the other provisions of this law, to receive from said board a certificate of authority.

Certificates of authority shall be valid for one year from the date thereof but shall be renewed by said board upon application within thirty days prior to the expiration thereof upon payment of five dollars to the secretary of said board, which application shall be accompanied by an affidavit and such other evidence deemed necessary, showing that applicant has complied with the provisions of this act.

The certificate of authority issued by said board under the provisions hereof, shall, among other things, recite that the bond or bonds, or other securities, as hereinafter required have been duly filed and approved, and such certificate shall authorize the person, firm or corporation, named in it, to engage in and carry on the business of an abstracter of real estate titles in the county or counties of the state of Montana, in which said person, firm or corporation has for use a set of abstract books or system of indices as provided for in section 66-2101, and for that purpose to have access to the public records in any office of any city, county or of the state during office hours, and to make such memoranda or notation therefrom as may be necessary for the purpose of making such abstracts, and the compiling, posting, copying and keeping up of their abstract books, indices or records, such access to be during ordinary office hours.

History: En. Sec. 11, Ch. 105, L. 1931. Refer

References

State v. Abstracters Board of Examiners, 99 M 564, 45 P 2d 668.

(4139.12) No abstract books or indices required under certain conditions. Any person, firm or corporation not having the abstract books or indices as required by section 66-2101, and who, upon the first day of March, 1931, is the holder of a valid and subsisting certificate of authority issued by the state treasurer of the state of Montana, pursuant to section 4140, of the Revised Codes of 1921, and who shall make application to said board prior to the expiration of such certificate of authority and who shall comply with the other requirements hereof, providing for a registered abstracter, bond and other provisions, shall, upon the payment of five dollars as is herein provided, be issued a certificate of authority under the provisions of this act. Any person, firm or corporation, desiring to engage in the business of making and compiling abstract of title to real property in any county in this state and who is not at the time of making application to said board for a certificate of authority provided with a completed set of abstract books or indices to the records in the county clerk and recorder's office of such county as required by section 66-2101, and who can comply with the other requirements hereof providing for a registered abstracter, bond and other provisions, shall, upon submitting satisfactory proof to said board that he has been and on the first day of January, 1939, was the holder of a temporary certificate, issued by said board, and is engaged in good faith in the preparation of such abstract books or indices and that he intends in good faith to complete the same, and upon payment of five dollars shall be issued a temporary certificate of authority good for a period of one year,

and upon good cause being shown to said board, such certificate shall be renewed from year to year until and including the year 1943, upon payment of five dollars for each annual certificate.

History: En. Sec. 12, Ch. 105, L. 1931; amd. Sec. 1, Ch. 82, L. 1939.

References

NOTE.—See note to Sec. 66-2107.

State v. Abstracters Board of Examiners, 99 M 564, 45 P 2d 668.

66-2113. (4139.13) Bond or other securities required. Before a certificate of authority shall be issued, the applicant shall file with the board a bond or bonds, to be approved by it, running to the state of Montana, in the penal sum of five thousand dollars, for the use of any owner, mortgagee or other person having an actual interest in the real estate covered by an abtract of title, or any title insurance company licensed and authorized to do business in this state, who may be aggrieved; such bond or undertaking shall be conditioned for the payment by such abstracter of any and all damages that may be sustained by or may accrue to any such person or company by reason of or on account of any error, deficiency or mistake in any abstract or certificate of title, or any continuation thereof, made or issued by such abstracter; said bond shall be written by some surety or other company issuing such bonds and licensed and authorized to do business in this state, and no personal bonds are to be accepted under this provision. The bond or undertaking herein provided for shall be in full force and effect for a period of one year, and may be renewed annually by a continuation certificate; such continuation certificate, however, shall not increase the amount of liability under the original bond. Provided, however, that no person, firm or corporation shall be required at any time to have in force and effect with said board, valid bonds in excess of the penal sum of five thousand dollars.

And provided, however, that in lieu of such bond or bonds, said applicant may deposit with the state treasurer of the state of Montana public bonds or other securities as the board may prescribe, approve and deem fully sufficient to insure the payment of the penal sum of five thousand dollars. Such securities so deposited may be exchanged from time to time with the approval of the board, for other securities. The party so depositing such securities shall have the right and shall be permitted to receive the interest and dividends on the securities so deposited. Said securities shall be subject to sale and transfer and to the disposal of the proceeds by said board only on the order of a court of competent jurisdiction, and for the benefit of persons aggrieved as in this section provided. The state treasurer shall give his receipt for such securities, and the state shall be responsible for their custody and safe return.

History: En. Sec. 13, Ch. 105, L. 1931. ployer respecting matters to be included in abstract. 28 ALR 2d 891.

Abstracter's duty and liability to em-

66-2114. (4139.14) Seal. Any person, firm or corporation furnishing abstracts of title to real property under the provisions hereof shall provide a seal, which seal shall have stamped thereon the name and location of such person, firm or corporation, and shall deposit with the secretary of the board an impression of such seal and the names of persons authorized to

sign certificates to abstracts before the certificate of authority shall issue, which seal shall be affixed to every abstract or certificate of title issued by such person, firm or corporation, and to every continuation thereof.

History: En. Sec. 14, Ch. 105, L. 1931.

66-2115. (4139.15) Regulation of abstracters—violations—appeals. The board shall have, and it is hereby given the power to cancel and revoke any certificate of registration issued to any person under the provisions of this act for a violation of any of the provisions of this act, or upon a conviction of the holder of such certificate of a crime involving moral turpitude, or if the board finds such holder to be guilty of habitual carelessness or inattention to business or of fraudulent practices. The board shall also have and it is hereby given the power to cancel and revoke any certificate of authority issued to any person, firm or corporation under the provisions of this act for failure to furnish the bond or bonds, or other securities, required by section 66-2113, or such new or additional bonds as the board deems necessary, or for failure to maintain such indices and abstract records, or for failure to have in charge of such business a registered abstracter as herein provided, or shall otherwise violate any of the provisions of this act.

Upon a verified complaint being filed with the board charging the holder of a certificate of registration with a violation of any of the provisions of this act or conviction of a crime involving moral turpitude, or with habitual carelessness, or inattention to business, or fraudulent practices, or charging the holder of a certificate of authority with failure to furnish the bond or bonds, or other securities, required by section 66-2113, or such new or additional bonds, or securities as the board deems necessary, or with failure to have in charge of his or its abstract business, a registered abstracter as herein provided, or with a violation of any of the provisions of this act, the board shall immediately notify in writing said holder of such certificate, of the filing of said complaint and furnish the said holder with a copy of the said complaint. The board shall at the same time require the holder of such certificate to appear before it on a day fixed by said board, not less than twenty nor more than forty days from the date of the service of said complaint on the holder of such certificate, and to show cause why the said certificate should not be canceled and annulled. The board shall cause a transcript of any testimony taken, to be made by a stenographer.

Either the abstracter or the complainant may appeal from the decision of the board to the district court of the county in which the abstracter has his or its place of business. Such appeal shall be taken within thirty days after the decision of the board, by causing a written notice of appeal to be served on the secretary of the board and executing a bond to the state of Montana, with surety to be approved by the secretary of the board, conditioned to prosecute such appeal to effect and to pay all costs that may be adjudged against the appellant. The secretary of the board, upon an appeal being taken, must immediately make out a return of the proceedings in the matter before the board, with its decision thereon, and file the same, together with the bond and all the papers therein in his possession, including a certified record of the testimony taken at the hearing, with the clerk of the district court to which said appeal is taken. The district court shall

hear the appeal in a summary manner on such record, and the cost of such appeal including the furnishing of the testimony shall be taxed against either the abstracter or the complainant, whichever is defeated on such appeal. An appeal shall stay the cancellation of any certificate of registration or certificate of authority until the final decision on appeal.

History: En. Sec. 15, Ch. 105, L. 1931.

66-2116. (4139.16) Abstract prima-facie evidence of its contents. Any abstract of title to real estate, certified to be true and correct by any abtracter holding a valid and subsisting certificate of authority from the board, as herein provided, shall be received by the courts of this state as prima-facie evidence of its contents under such rules and regulations as to procedure as such courts may promulgate.

History: En. Sec. 16, Ch. 105, L. 1931.

Cross-Reference

Certified abstract of abstracter holding certificate of authority from state treasurer prima-facie evidence of contents, sec. 66-2120.

Collateral References
Abstracts of Title € 1.
1 C.J.S. Abstracts of Title §§ 1-4.

66-2117. (4139.17) Penalty. Any person, firm or corporation, making, compiling or certifying to abstracts of title to real property in this state without having complied with the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not exceeding six hundred dollars nor less than one hundred dollars for each offense. This act does not impair the right of any person to examine the public records and to make such copies or abstracts of instruments filed or recorded as he or she may desire.

History: En. Sec. 17, Ch. 105, L. 1931.

66-2118. (4139.18) To whom provisions of this act shall not apply. Nothing in this act shall be construed as prohibiting any person, firm or corporation holding a valid and subsisting certificate of authority as herein provided, from employing such additional clerical and stenographic assistants as may be necessary; provided, however, that such assistants are at all times under the supervision of a registered abstracter, and provided further, that the provisions of this act shall not apply to county clerks and recorders or persons employed by counties in the preparation of abstracts of title.

History: En. Sec. 18, Ch. 105, L. 1931.

References

State v. Abstracters Board of Examiners, 99 M 564, 45 P 2d 668.

66-2119. (4141) **Compensation of abstracters.** The compensation to be charged and received by abstracters of title shall be and remain a matter of contract between the parties.

History: En. Sec. 3, Ch. 43, L. 1915; re-en. Sec. 4141, R. C. M. 1921.

66-2120. (4142) Abstract prima-facie evidence of its contents. Any abstract of title to real estate, certified to be true and correct by any ab-

stracter holding a valid and subsisting certificate of authority from the state treasurer, as herein provided, shall be received by the courts of this state as prima-facie evidence of its contents, under such rules and regulations as to procedure as such courts may promulgate.

History: En. Sec. 4, Ch. 43, L. 1915; re-en. Sec. 4142, R. C. M. 1921.

board of examiners as prima-facie evidence of contents, sec. 66-2116.

Cross-Reference

Certified abstract of abstracter holding certificate of authority from abstracters

Rinio v. Kester, 99 M 1, 41 P 2d 405.

CHAPTER 22

VETERINARY MEDICINE—REGULATION OF PRACTICE

Appointment of state board of veterinary medical examiners. Section 66-2201.

66-2202. Organization of board-quorum-powers. 66-2203. Expenses and funds-records and reports.

Applications for license to practice—examinations—fees. Application for license as farrier. 66-2204.

66-2205. 66-2206. Farrier defined.

66-2207. Issuance, registration and reinstatement of licenses.

Display of license and certificate—arrangement with other boards. 66-2208.

Veterinary medicine defined.

66-2209. 66-2210. Refusal, suspension, and revocation of license and certificate.

66-2211. Interpretation of statute—persons not embraced within provisions.

Practice in violation of law-penalties. 66-2212.

66-2201. (3217) Appointment of state board of veterinary medical examiners. There is hereby created a state board of veterinary medical examiners, to be appointed by the governor of the state of Montana, which shall consist of five (5) reputable veterinarians who shall have graduated from a college authorized by law to confer degrees and having educational standards equal to those approved by the American veterinary medical association, and each of whom shall be licensed and registered under this act. Appointments shall be made for the term of five (5) years, provided that first appointments made pursuant to this chapter shall be one (1) for one (1) year, expiring on July 31, 1956, and one (1) for four (4) years, expiring on July 31, 1959, and provided, further, that the provisions of this chapter shall not affect or alter the terms of office of the present members of the state board of veterinary examiners which expire respectively on July 31, 1955, July 31, 1957, and July 31, 1958. Members of the board shall serve until their successors are appointed and qualified. The Montana state veterinary medical society shall, at each annual meeting, nominate twice the number of examiners to be appointed that year on the board. The names of such nominees shall be annually transmitted under seal by the president and secretary, prior to July first, to the governor, who shall, prior to August first, appoint from such lists the examiners that will be required to fill any vacancies that will occur from expiration of term on July thirty-first. Any other vacancy, however occurring, shall likewise be filled by the governor for the unexpired term. Each nominee, before appointment, shall furnish to the governor proof that he has received a degree in veterinary medicine from an authorized veterinary medical school, and that he is licensed by the state board of veterinary medical examiners, and that he has actually and legally practiced veterinary medicine in either private practice or public service in the state of Montana for at least five (5) years, immediately preceding his appointment. If no nominees are legally before him from the society, the governor may appoint from licensed and registered members of the veterinary profession in good standing in Montana without restriction. The governor may, after due notice and hearing, remove any examiner for misconduct, incapacity, or neglect of duty.

History: En. Sec. 1, Ch. 82, L. 1913; re-en. Sec. 3217, R. C. M. 1921; amd. Sec. 1, Ch. 90, L. 1955.

Collateral References
Physicians and Surgeons 3.

70 C.J.S. Physicians and Surgeons § 13 et seq.

66-2202. (3218) Organization of board — quorum — powers. veterinary medical examiner shall receive a certificate of appointment from the governor, and, before beginning his term of office, shall file with the secretary of state the constitutional oath of office. The board shall annually elect from its members a president, vice-president, and secretarytreasurer, and shall hold at least two (2) regular meetings each year. At any meeting three (3) members of the board shall constitute a quorum. If any member of the board shall, without cause, absent himself from two (2) of its regular meetings consecutively, his office shall be deemed vacant. The board is hereby authorized and empowered: to promulgate, revise, alter, and amend and enforce reasonable rules, regulations and orders which it determines in its discretion to be necessary to the performance of its duties; to prescribe forms for application for examination and license; to prepare and supervise examination of applicants for license to practice veterinary medicine; to obtain the services of professional examination agencies in lieu of its own preparation of such examinations; to issue and revoke licenses as hereinafter provided; to hold hearings, issue subpoenas, administer oaths and take testimony and proofs concerning all matters within its jurisdiction; to issue commissions to take depositions of witnesses who are sick or absent from the state; to employ attorneys, subject to the approval of the attorney general, to assist county attorneys in prosecutions brought under this chapter in the respective district courts of the state or to assist the attorney general in representing the board before the supreme court; to employ attorneys or other qualified persons to serve as referees in the holding of hearings ordered by the board.

History: En. Sec. 2, Ch. 82, L. 1913; re-en. Sec. 3218, R. C. M. 1921; amd. Sec. 2, Ch. 90, L. 1955.

66-2203. (3219) Expenses and funds—records and reports. Each member of the board shall be entitled to receive all necessary traveling and subsistence expenses, provided such expenses shall not exceed the amount in the treasury during any fiscal year. The secretary-treasurer shall receive an additional salary to be fixed annually by the board and not to exceed five hundred dollars (\$500.00) per annum. The board shall require the secretary-treasurer to give bond in such sum and with such conditions as the board may from time to time direct. The board shall keep full and complete minutes of its proceedings and of its receipts and disbursements,

and a full and accurate list of all persons licensed and registered by it, and such records shall be public records, and shall, at all times, be open to public inspection. The secretary-treasurer of said board shall be the legal custodian of all moneys received for licenses or certificates of registration, as provided by this article, up to and including the sum of five thousand dollars (\$5,000.00). If, at any time, the amount of moneys received, after deducting such salaries and expenses, shall amount to more than five thousand dollars (\$5,000.00), the secretary-treasurer shall forward the amount in excess of five thousand dollars (\$5,000.00) to the treasurer of the state of Montana, and receive his official receipt for same. Said board shall, not later than July fifteenth of each year, submit to the governor a full and complete report of its proceedings during the twelve (12) months immediately preceding.

History: En. Sec. 3, Ch. 82, L. 1913; re-en. Sec. 3219, R. C. M. 1921; amd. Sec. 3, Ch. 90, L. 1955.

66-2204. (3220) Applications for license to practice—examinations fees. Any citizen of the United States who is over the age of twenty-one (21) years desiring to begin the practice of veterinary medicine or veterinary surgery in the state of Montana, or who shall desire to hold himself or herself out to the public as a practitioner of veterinary medicine or veterinary surgery, except as provided in section 66-2211, shall make application to said board of examiners for license so to do. Such application shall be upon a form furnished by said board, and shall be accompanied by satisfactory evidence of the good moral character of the applicant, and shall present evidence of his having graduated in and received a degree from a legally authorized veterinary medical school having educational standards equal to those approved by the American veterinary medical association. On application, a photostatic copy of the diploma of said applicant shall be submitted to said board for inspection and verification, and such photostatic copy shall be and remain the property of the board. Every person applying to said board for license to practice shall pay to the board the fee of twenty-five dollars (\$25.00), which fee shall in no case be refunded, and which shall become a part of the funds of the treasury of the board. Said board shall by means of examination, either oral or written or practical, or such combination of oral or written or practical as the board may determine, ascertain the professional qualifications for license of all applicants under this act, except that investigation under reciprocity arrangements may replace examination for licensees from other states as provided by section 66-2208, and the board shall issue such license to all who are found upon such examination or investigation to be in the judgment of said board competent to practice, and no such license shall be issued to any person who is not found by such examination or investigation to be competent.

Such examination shall be held in January and June of each year at a time and place or places specified by said board. Such examination shall cover theory and practice, materia medicia [medica] and therapeutics, livestock sanitation, surgery, and communicable diseases and such other subjects chosen by the board as are ordinarily included in the curriculum

of a legally chartered school of veterinary medicine recognized and approved by the American veterinary medical association.

Said board shall consecutively number all applications received and note upon each the disposition made of it and preserve same for reference, and shall number consecutively all licenses issued; provided, that veterinarians who are at the time of the passage and approval of this act licensed and registered to practice veterinary medicine in the state of Montana, shall be entitled to a license without such examination.

All applicants must achieve a grade of seventy per cent (70%) in all subjects in order to obtain a license. An applicant who has failed an examination may apply to be re-examined at any subsequent examination, shall pay another application fee in the amount of twenty-five dollars (\$25.00), and shall take another complete examination in all subjects.

An applicant for examination hereunder may in the discretion of the board be given a temporary permit to practice veterinary medicine prior to taking the examination, provided such applicant is employed by and working under the supervision of and in the same office with a veterinarian licensed under this act; such temporary permit shall be valid only until the date of the next succeeding examination, and no longer, and under no circumstances shall the board issue a second temporary permit to the same person. A temporary permit shall not be issued to a person who has failed an examination given by the board.

History: En. Sec. 4, Ch. 82, L. 1913; amd. Sec. 1, Ch. 150, L. 1919; re-en. Sec. 3220, R. C. M. 1921; amd. Sec. 4, Ch. 90, L. 1955.

Collateral References

Physicians and Surgeons 5.
70 C.J.S. Physicians and Surgeons § 10 et seq.

Failure of veterinary to procure license as affecting recovery for services. 30 ALR 834; 42 ALR 1226 and 118 ALR 646.

Validity of educational requirements of statutes or regulations relating to practice of veterinary medicine. 50 ALR 2d 875.

66-2205. (3221) Application for license as farrier. Any person desiring to begin the practice of treating domestic animals in the state of Montana, under the title of farrier, shall make application to said board of veterinary medical examiners on or before July 1, 1919, so to do. Such application shall be upon a form furnished by said board, and shall be accompanied by the fee prescribed in the preceding section, and satisfactory evidence of the good moral character of the applicant, who shall present satisfactory evidence of having resided in the state of Montana for a period of twenty-four months immediately previous to the passage and approval of this act, and of having treated domestic animals as a part of his or her vocation during that period, and a license shall be granted. Such license shall entitle him or her to all the rights and privileges of this act except those contained in section 66-2209.

History: En. Sec. 5, Ch. 82, L. 1913; amd. Sec. 2, Ch. 150, L. 1919; re-en. Sec. 3221, R. C. M. 1921.

66-2206. (3222) **Farrier defined.** A farrier is any person who has had experience in treating the diseases of domestic animals.

History: En. Sec. 6, Ch. 82, L. 1913; re-en. Sec. 3222, R. C. M. 1921.

66-2207. (3223) Issuance, registration and reinstatement of licenses. The state board of veterinary medical examiners will, at the conclusion of a regular examination or after investigation under reciprocity arrangements as provided by section 66-2208, if in their judgment the applicant is duly qualified therefor, issue a license to practice veterinary medicine.

Every license so granted by the board shall be issued under seal, and shall be signed by the president and secretary-treasurer of the board, and shall state that the licensee has given satisfactory evidence of fitness as to age, character, veterinary medical education, and all other matters required by law, and that after full examination or investigation under reciprocity arrangements he or she has been found duly qualified to practice.

Each person licensed by the board to practice veterinary medicine in this state shall procure from the secretary of the board on or before July first, annually, his certificate of registration. Such certificate shall be issued by the secretary upon the payment of a fee to be fixed annually by the board, not exceeding the sum of ten dollars (\$10.00), and certificate so issued shall be prima-facie evidence of the right of the holder to practice veterinary medicine in this state during the time for which it is issued. Failure of a person licensed by the board to procure a certificate of registration on or before July first of every year shall ipso facto constitute a forfeiture of the license held by such person, provided, however, that any person who has thus forfeited his license may have it restored to him by making written application for restoration within one (1) year of such forfeiture setting forth the reasons for failure to procure the certificate of registration at the time specified by this section and accompanied by payment of the registration fee hereinabove set forth and such additional restoration fee not to exceed ten dollars (\$10.00) as the board may require. Such person so making application for restoration of license within one (1) year of its forfeiture by him shall not be required to submit to examination.

Notwithstanding any other provisions in this chapter, any person licensed by the board who enters, or is called to active duty by, any branch of the armed services of the United States shall be entitled to receive automatic registration of his license during the period of his duty with the armed services, provided, however, that within one (1) year after release or discharge from duty in such armed services he shall procure a certificate of renewal from the board and pay the regular fee therefor. Failure of such person to procure such certificate of renewal within one (1) year after such release or discharge shall be the equivalent of a failure to procure a certificate of registration on or before July first of any year, and the same forfeiture and restoration requirements shall be invoked.

Each person licensed by the board shall at all times have his residence and office address on file with the board.

History: En. Sec. 7, Ch. 82, L. 1913; re-en. Sec. 3223, R. C. M. 1921; amd. Sec. 5, Ch. 90, L. 1955. Cross-Reference Liquor regulations, sec. 4-138. Collateral References

Physicians and Surgeons 5, 11. 70 C.J.S. Physicians and Surgeons §§ 13, 16, 23.

Validity of statutes or regulations relating to practice of veterinary medicine. 50 ALR 2d 870.

66-2208. (3224) Display of license and certificate—arrangement with other boards. No person shall practice veterinary medicine in the state of Montana without possessing and displaying prominently in his or her principal office a license and a current and valid certificate of registration issued pursuant to the provisions of this act. The board of veterinary medical examiners may make arrangement with similar boards in the several states in so far as practicable, whereby due credit for state and territorial licenses will be allowed in the state of Montana to such licensees of said board as desire to secure license to practice veterinary medicine in this state, and whereby licensees of the board of veterinary medical examiners in this state will secure due credit for license issued by said board, whenever such licensees desire to secure license to practice in any other state or territory; but no arrangement shall be made under the provisions of this section which will be liable to lower the standard of practice of veterinary medicine in the state of Montana. The board may, if deemed necessary, require an examination of applicants for license from other states after careful consideration of credentials from such states. The board shall by regulation establish methods and procedures for investigation of applicants for license by reciprocity, and no license shall be issued as a result of reciprocity between the states to any applicant unless such applicant has been lawfully and continuously in practice as a licensed veterinarian for at least one (1) year in the state from which he applies immediately preceding the date of his application for a license to practice in

History: En. Sec. 8, Ch. 82, L. 1913; re-en. Sec. 3224, R. C. M. 1921; amd. Sec. 6, Ch. 90, L. 1955.

- **66-2209.** (3225) **Veterinary medicine defined.** Any person shall be deemed in the practice of veterinary medicine when he does any of the following:
- (a) Represents himself as or is engaged in the practice of veterinary medicine in any of its branches either directly or indirectly.
- (b) Uses any words, titles, or letters in such connection or upon any display or advertisement or under any circumstances so as to induce the belief the person using them is engaged in the practice of veterinary medicine. Such use shall be prima-facie evidence of the intention to represent oneself as engaged in the practice of veterinary medicine in any of its branches.
- (c) Diagnoses, prescribes or administers any drug, medicine, appliance, application, or treatment of whatever nature, or performs a surgical operation or manipulation, for the prevention, cure, or relief of a pain, deformity, wound, fracture, or bodily injury or physical condition or disease of animals.
- (d) Instructs, demonstrates or solicits, by any notice, sign, or other indication, with contract either express or implied, or otherwise, with or

without the necessary instruments for the administration of biologics or medicines or animal disease cures for the prevention and treatment of disease of animals and any and all remedies for the treatment of internal parasites in animals.

No person shall practice veterinary medicine or veterinary surgery, or farriery, in the state of Montana unless licensed by the state board of veterinary medical examiners of the state of Montana, and registered as required by this chapter; nor shall any person practice veterinary medicine, surgery, or farriery, whose authority to practice is suspended or revoked by said board.

History: En. Sec. 9, Ch. 82, L. 1913; re-en. Sec. 3225, R. C. M. 1921; amd. Sec. 7, Ch. 90, L. 1955.

- 66-2210. (3226) Refusal, suspension, and revocation of license and certificate. The state board of veterinary medical examiners may either refuse to issue a license or refuse to issue a certificate of registration or suspend or revoke a license and certificate of registration upon any of the following grounds:
 - (a) Fraud or deception in procuring the license.
- (b) The publication or use of any untruthful or improper statement, or representation with the view of deceiving the public, or any client or customer in connection with the practice of veterinary medicine.
- (c) The conviction of a felony as shown by a certified copy of the record of the court of conviction.
- (d) Habitual intemperance in the use of intoxicating liquors, or habitual addiction to the use of morphine, cocaine, or other habit forming drugs, or conviction of a violation of any federal or state law relating to narcotic drugs.
- (e) Immoral, unprofessional, or dishonorable conduct manifestly disqualifying the licensee from practicing veterinary medicine.
- (f) Gross malpractice, including failure to furnish to the board, upon written application by it, any report or information relating thereto.
- (g) The employment of unlicensed persons to perform work which under this chapter can lawfully be done only by persons licensed to practice veterinary medicine.
- (h) Fraud or dishonest conduct in applying or reporting diagnostic biological tests or in issuing health certificates.
 - (i) Failure to keep one's premises in a clean and sanitary condition.
- (j) Violation of any of the provisions of this act or of any of the rules, regulations or orders promulgated by the state board of veterinary medical examiners to carry out the provisions of this chapter.
- (k) Revocation by proper authorities for any of the above reasons of a license issued by a sister state.

The board may neither refuse to issue a license or certificate of registration nor suspend or revoke any license and certificate of registration, however, for any such cause, unless the person accused has been given at least twenty (20) days' notice in writing of the charge against him, and a public hearing by the board is first had.

Such hearing shall be held by the board or by a referee appointed by the board; and the board or its duly authorized referee is hereby authorized to administer oaths, subpoena witnesses and compel the production of relevant books and papers and receive evidence in order to carry out the provisions of this act.

History: En. Sec. 10, Ch. 82, L. 1913; re-en. Sec. 3226, R. C. M. 1921; amd. Sec. 8, Ch. 90, L. 1955.

Validity of license revocation provisions of statutes or regulations relating to practice of veterinary medicine. 50 ALR 2d 879

Collateral References

Liability of veterinarian for malpractice. 38 ALR 2d 503.

66-2211. (3227) Interpretation of statute—persons not embraced within provisions. This chapter does not apply to:

- (a) Veterinarians in the performance of their official duties, either civil or military, in the service of the United States of America, unless they engage in the practice of veterinary medicine, as defined in this chapter, in a private capacity.
- (b) Laboratory technicians and veterinary research workers, as distinguished from veterinarians, in the employ of the state of Montana, or United States of America and engaged in labors in laboratories under the direct supervision of the Montana livestock sanitary board, Montana state college or the United States of America.
- (c) Lawfully qualified veterinarians from other states or any foreign country meeting legally licensed and registered Montana veterinarians in this state in consultation.
- (d) Any veterinarian residing on a border of a neighboring state and duly authorized under the laws thereof to practice veterinary medicine therein, who is actually called to attend cases in this state, but who does not open an office or appoint a place to meet patients or receive calls within this state, provided that veterinarians licensed and registered in this state are extended a like privilege to engage in the practice of veterinary medicine to the same extent in the neighboring state.
- (e) The employment of veterinary medical students who have successfully completed three (3) years of the professional curriculum in veterinary medicine at a college having educational standards equal to those approved by the American veterinary medical association and authorized by law to confer degrees as assistants to veterinarians licensed and registered pursuant to this chapter; provided, however, such employment shall not be contracted for or entered into except after written application for approval directed to the board of veterinary medical examiners and the written grant of approval by said board; and provided, further, such employment shall not be for a period in excess of six (6) months from the date of completion of such third year of study.

The operations known and designated as spaying, castrating, or dehorning of large animals shall not be considered the practice of veterinary medicine within the meaning of this chapter.

Nothing in this chapter shall be construed or interpreted to prohibit any person from treating his own farm animals or being assisted in such treatment by his employees regularly employed in the conduct of his business, or by other persons whose services are rendered gratuitously in case of emergency.

Nothing in this chapter shall be construed or interpreted to prohibit the selling of veterinary remedies and instruments by a registered pharmacist at his regular place of business.

History: En. Sec. 11, Ch. 82, L. 1913; re-en. Sec. 3227, R. C. M. 1921; amd. Sec. 9, Ch. 90, L. 1955.

Collateral References

Physicians and Surgeons 2 et seq. 70 C.J.S. Physicians and Surgeons § 2 et

(3228) Practice in violation of law—penalties. Any person practicing veterinary medicine or farriery within this state, as defined in this chapter, without first having obtained a license to practice and being registered as required by this chapter, or after his license to practice has been suspended or revoked, or contrary to the provisions of this chapter in any manner, shall be guilty of a misdemeanor for each violation of the provisions of this chapter or for each act relating to the practice of veterinary medicine in this state, and upon conviction shall be punished by a fine of not less than two hundred dollars (\$200.00) nor more than five hundred dollars (\$500.00), or by imprisonment in the county jail for not less than thirty (30) days nor more than six (6) months, or by both said fine and imprisonment. Any person convicted a second time for any violation of this chapter shall be punished by both such fine and imprisonment. The district court shall have jurisdiction of all prosecutions brought hereunder.

History: En. Sec. 12, Ch. 82, L. 1913; re-en. Sec. 3228, R. C. M. 1921; amd Sec. 10, Ch. 90, L. 1955.

Collateral References

Physicians and Surgeons 6. 70 C.J.S. Physicians and Surgeons § 29.

CHAPTER 23

ENGINEERS AND LAND SURVEYORS

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66-2347. Practices to which act inapplicable.

66-2301 to 66-2323. Repealed—Chapter 150, Laws of 1957.

Repeal

These sections (Secs. 1-23, Ch. 284, L. 1947), relating to the regulation of civil

engineers and land surveyors, were repealed by Sec. 27, Ch. 150, Laws 1957. For new provisions see 66-2324 to 66-2347.

66-2324. Registration required. That in order to safeguard life, health, and property, and to promote the public welfare, any person in either public or private capacity, practicing or offering to practice engineering or land surveying, shall hereafter be required to submit evidence that he is qualified so to practice and shall be registered as hereinafter provided; and from and after the first day of January, 1958, it shall be unlawful for any person to practice or to offer to practice in this state, engineering or land surveying, as defined in this act, or to use in connection with his name or otherwise assume, use or advertise any title or description tending to convey the impression that he is a professional engineer or a land surveyor, unless such person has been duly registered under the provisions of this act.

History: En. Sec. 1, Ch. 150, L. 1957.

Collateral References

Constitutionality of statute regulating land surveyors or civil engineers. 55 ALR 307.

66-2325. Short title. This act shall be known and may be cited as the Montana Professional Engineers' Registration Act.

History: En. Sec. 2, Ch. 150, L. 1957.

66-2326. Definitions. The term "engineer" as used in this act shall mean a professional engineer as hereinafter defined.

The term "professional engineer" within the meaning and intent of this act shall mean a person who, by reason of his special knowledge of the mathematical and physical sciences and the principles and methods of engineering analysis and design, acquired by professional education and practical experience, is qualified to practice engineering as hereinafter defined, as attested by his legal registration as a professional engineer.

The term "engineer-in-training" as used in this act shall mean a candidate for registration as a professional engineer who is a graduate in an approved engineering curriculum of four years or more from a school or college approved as of satisfactory standing by the engineers' council for professional development or its successor as an agency evaluating professional engineering curricula, or who has had four years or more of experience in engineering work of a character satisfactory to the board; and who, in addition, has successfully passed the examination in the fundamental engineering subjects as provided in section 66-2338, and who shall have received from the board, as hereinafter defined, a certificate stating that he has successfully passed this portion of the professional examinations.

The term "practice of engineering" within the meaning and intent of this act shall mean any professional service or creative work requiring engineering education, training, and experience and the application of such special knowledge of the mathematical, physical, and engineering sciences to such professional services or creative work as consultation, investigation, evaluation, planning, design, and supervision of construction for the purpose of assuring compliance with specifications and design, in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works, or projects.

The practice of engineering shall not include the work ordinarily performed by persons who operate or maintain machinery or equipment, or communication lines or signal circuits, or electric power lines or pipelines.

The term "land surveyor" as used in this act shall mean a person who engages in the practice of land surveying as hereinafter defined.

The practice of land surveying within the meaning and intent of this act includes surveying of areas for their correct determination and description and for conveyancing, or for the establishment or re-establishment of land boundaries and the plotting of lands and subdivisions thereof.

The term "board" as used in this act shall mean the state board of registration for professional engineers and land surveyors provided for by this act.

History: En. Sec. 3, Ch. 150, L. 1957.

66-2327. Board—members—term. A state board of registration for professional engineers and land surveyors is hereby created whose duty it shall be to administer the provisions of this act. The board shall consist of five professional engineers, who shall be appointed by the governor. No more than two members shall be from the same branch of the profession of engineering. All board members shall have the qualifications required by section 66-2328.

The members of the first board shall be appointed within ninety days after the passage of this act. Two members of the first board shall be members of the previous civil engineer board, and shall serve for one and two year terms respectively. The other appointments to the first board shall be for the terms of three, four, and five years respectively, or until their successors are duly appointed and qualified. Every member of the board shall receive a certificate of his appointment from the governor and before beginning his term of office shall file with the secretary of state his written oath or affirmation for the faithful discharge of his official duty. Each member of the board first appointed hereunder shall receive a certificate of registration under this act from said board. On the expiration of the term of any member, the governor shall appoint for a term of five years a registered professional engineer, having the qualifications required by section 66-2328, to take the place of the member whose term on said board is about to expire. Each member shall hold office until the expiration of the term for which such member is appointed or until a successor shall have been duly appointed and shall have qualified. A member of the board may be appointed to succeed himself.

History: En. Sec. 4, Ch. 150, L. 1957.

66-2328. Board—qualifications. Each member of the board shall be a citizen of the United States and a resident of this state, and shall have been engaged in the practice of engineering for at least twelve years, and shall have been in responsible charge of important engineering work for at least five years. Responsible charge of engineering teaching may be construed as responsible charge of important engineering work.

History: En. Sec. 5, Ch. 150, L. 1957.

66-2329. Board—compensation and expenses. Each member of the board shall receive per diem when actually attending to the work of the board or any of its committees and for the time spent in necessary travel. Such per diem shall be fixed by the board in its sound discretion, but it shall not exceed twenty-five dollars (\$25.00) per day. In addition thereto, each member shall be reimbursed for all actual traveling, incidental, and clerical expenses necessarily incurred in carrying out the provisions of this act.

History: En. Sec. 6, Ch. 150, L. 1957.

66-2330. Board—removal of members—vacancies. The governor may remove any member of the board for misconduct, incompetency, neglect of duty, or for any other sufficient cause. Vacancies in the membership of the board shall be filled for the unexpired term by appointment by the governor.

History: En. Sec. 7, Ch. 150, L. 1957.

66-2331. Board—organization—meetings. The board shall hold a meeting within thirty days after its members are first appointed, and thereafter shall hold at least two regular meetings each year. Special meetings shall be held at such time as the rules and regulations of the board may provide. Notice of all meetings shall be given in such manner as the rules and regulations may provide. The board shall elect annually the following officers: A chairman, a vice-chairman, and a secretary. A quorum of the board shall consist of not less than three members.

History: En. Sec. 8, Ch. 150, L. 1957.

66-2332. Board—powers. The board shall have the power to adopt and amend all rules and regulations and rules of procedure, not inconsistent with the constitution and laws of this state, which may be reasonably necessary for the proper performance of its duties and the regulations of the proceedings before it. The board shall adopt and have an official seal.

In carrying into effect the provisions of this act, the board, under the hand of its chairman and the seal of the board may subpoena witnesses and compel their attendance, and also may require the production of books, papers, documents, etc., in a case involving the revocation of registration or practicing or offering to practice without registration. Any member of the board may administer oaths or affirmations to witnesses appearing before the board. If any person shall refuse to obey any subpoena so issued, or shall refuse to testify or produce any books, papers, or documents, the board may present its petition to the district court, setting forth the facts,

and thereupon such court shall, in a proper case, issue its subpoena to such person, requiring his attendance before such authority and there to testify or to produce such books, papers, and documents, as may be deemed necessary and pertinent by the board. Any person failing or refusing to obey the subpoena or order of the said court may be proceeded against in the same manner as for refusal to obey any other subpoena or order of said court.

History: En. Sec. 9, Ch. 150, L. 1957.

66-2333. Professional engineers' fund-receipts and disbursementssecretary—assistants. The secretary of the board shall receive and account for all moneys derived under the provisions of this act, and shall pay the same monthly to the state treasurer, who shall keep such moneys in a separate fund to be known as the "professional engineers' fund." Such fund shall be kept separate and apart from all other moneys in the treasury, and shall be paid out only by warrants drawn by the state auditor, upon claims filed and approved as required by law. All moneys in the "professional engineers' fund" are hereby specifically appropriated for the use of the board. The secretary of the board shall give a surety bond to the state in such sum as the board may determine. The premium on said bond shall be regarded as a proper and necessary expense of the board, and shall be paid out of the "professional engineers' fund." The secretary of the board shall receive such salary as the board shall determine in addition to the compensation and expenses provided for in section 66-2329. The board may appoint an assistant secretary or executive secretary or may employ such clerical or other assistants as are necessary for the proper performance of its work, and may make expenditures of this fund for any purpose which in the opinion of the board is reasonably necessary for the proper performance of its duties under this act, including the expenses of the board's delegates to annual conventions of, and membership dues to, the national council of state boards of engineering examiners. Under no circumstances shall the total amount of warrants issued by the state auditor in payment of the expenses and compensation provided for in this act exceed the amount of the examination and registration fees collected as herein provided.

History: En. Sec. 10, Ch. 150, L. 1957.

66-2334. Records and reports—register. The board shall keep a record of its proceedings and a register of all applicants for registration, which register shall show (a) the name, age, and residence of each applicant; (b) the date of the application; (c) the place of business of such applicant; (d) his educational and other qualifications; (e) the branch or branches of engineering in which the applicant qualified; (f) whether or not an examination was required; (g) whether the applicant was rejected; (h) whether a certificate of registration was granted; (i) the date of the action of the board; and (j) such other information as may be deemed necessary by the board.

The records of the board shall be prima-facie evidence of the proceedings of the board set forth therein, and a transcript thereof, duly certified

by the secretary of the board under seal, shall be admissible in evidence with the same force and effect as if the original were produced.

Annually, as of June 30, the board shall submit to the governor a report of its transactions of the preceding year, and shall also transmit to him a complete statement of the receipts and expenditures of the board, attested by affidavits of its chairman and its secretary.

History: En. Sec. 11, Ch. 150, L. 1957.

66-2335. Roster. A roster showing the names and places of business of all registered professional engineers and all registered land surveyors shall be published by the secretary of the board during the month of April of each year. Copies of this roster shall be mailed to each person so registered, placed on file with the secretary of state, the clerk of each incorporated city and town and in the office of each county clerk and recorder within the state, and furnished to the public upon request.

History: En. Sec. 12, Ch. 150, L. 1957.

66-2336. Requirements for registration. The following shall be considered as minimum evidence satisfactory to the board that the applicant is qualified for registration as a professional engineer, or land surveyor, or for certification as an engineer-in-training, respectively:

(1) As a professional engineer:

a.—Graduation in an approved engineering curriculum of four years or more from a school or college approved as of satisfactory standing by the engineers' council for professional development, or its successor as an agency evaluating professional engineering curricula; and a specific record of an additional four years or more of experience in engineering work of a character satisfactory to the board, and indicating that the applicant is competent to practice engineering (in counting years of experience, the board at its discretion may give credit, not in excess of one year, for satisfactory graduate study in engineering), and by successfully passing an oral or written examination, or both, as the board may determine; or

b.—A specific record of eight years or more of experience in engineering work of a character satisfactory to the board, and successfully passing a written, or written and oral, examination designated to show that the applicant is competent to practice engineering; or

c.—A specific record of twelve years or more of lawful practice in engineering work of a character satisfactory to the board and indicating that the applicant is competent to practice engineering and has had responsible charge of important professional engineering work for at least five years, and provided applicant is not less than thirty-five years of age.

(2) As an engineer-in-training:

a.—Graduation in an accredited engineering curriculum of four scholastic years or more from a school or college approved as of satisfactory standing by the engineers' council for professional development, or its successor as an agency evaluating professional engineering curricula, and successfully passing a written examination in the basic engineering subjects; or

b.—A specific record of four years or more of experience in engineering work of a character satisfactory to the board, and successfully passing a written examination in the basic engineering subjects.

(3) As a land surveyor:

- a.—Graduation from a school or college approved as of satisfactory standing by the engineers' council for professional development, or its successor as an agency evaluating professional engineering curricula, including the completion of an approved course in surveying; and an additional two years or more of experience in land surveying work of a character satisfactory to the board and indicating that the applicant is competent to practice land surveying; or
- b.—A specific record of six years or more of experience in land surveying work of a character satisfactory to the board and indicating that the applicant is competent to practice land surveying, and successfully passing a written, or written and oral, examination in surveying prescribed by the board; or
- c.—A specific record of ten years or more of lawful practice in land surveying work of a character satisfactory to the board and provided applicant is not less than thirty years of age.

No person shall be eligible for registration as a professional engineer, or land surveyor, or certification as an engineer-in-training, who is not of good character and reputation.

In considering the qualifications of applicants, engineering teaching may be construed as engineering experience.

The satisfactory completion of each year of an approved curriculum in engineering in a school or college approved as of satisfactory standing by the engineers' council for professional development, or its successor as an agency evaluating professional engineering curricula, without graduation, shall be considered as equivalent to a year of experience in section 66-2336 (1) b and (2) b. Graduation in a curriculum other than engineering from a college or university of recognized standing may be considered as equivalent to two years of experience in section 66-2336 (1) and (2) b; provided, however, that no applicant shall receive credit for more than four years of experience because of undergraduate educational qualifications.

The mere execution, as a contractor, of work designed by a professional engineer, or the supervision of the construction of such work as a foreman or superintendent shall not in itself be deemed to be qualifying engineering experience.

Any person having the necessary qualifications prescribed in this act to entitle him to registration shall be eligible for such registration although he may not be practicing his profession at the time of making his application.

History: En. Sec. 13, Ch. 150, L. 1957.

Collateral References

Licenses \$20. 53 C.J.S. Licenses § 33. 33 Am. Jur. 336, Licenses, § 17.

66-2337. Application for registration—fees. Applications for registration shall be on forms prescribed and furnished by the board, shall con-

tain statements made under oath, showing the applicant's education and detailed summary of his technical work, and shall contain not less than five references, of whom three or more shall be engineers having personal knowledge of his engineering experience.

The registration fee for professional engineers shall be twenty dollars (\$20.00), ten dollars (\$10.00) of which shall accompany application, the remaining ten dollars (\$10.00) to be paid upon issuance of certificate. When a certificate of qualification issued by the national bureau of engineering registration is accepted as evidence of qualification, the total fee for registration as professional engineer shall be ten dollars (\$10.00).

The fee for engineer-in-training shall be ten dollars (\$10.00), which shall accompany the application and shall include the cost of examination and issuance of certificate. When certification as an engineer-in-training by another state, or any territory or possession of the United States, or of any country, is accepted as evidence of qualification, the fee for engineer-in-training in Montana shall be one dollar (\$1.00). When registration as a professional engineer is completed by an engineer-in-training, an additional fee of ten dollars (\$10.00) shall be paid before issuance of certificate as a professional engineer.

The registration fee for land surveyors shall be ten dollars (\$10.00), which shall accompany the application. The fee for registration as both a professional engineer and land surveyor shall be thirty dollars (\$30.00), ten dollars (\$10.00) of which shall accompany the application, the remaining twenty dollars (\$20.00) to be paid upon issuance of certificate.

Should the board deny the issuance of a certificate of registration to any applicant the initial fee deposited shall be retained as an application fee.

History: En. Sec. 14, Ch. 150, L. 1957.

66-2338. Examinations. When oral or written examinations are required, they shall be held at such time and place as the board shall determine. When examinations are required on fundamental engineering subjects (such as are ordinarily given in college curricula), the applicant shall be permitted to take this part of the professional examination prior to his completion of the requisite years of experience in engineering work, and satisfactory passage of this portion of the professional examination by the applicant shall constitute a credit for a period of ten years. The board shall issue to each applicant upon successfully passing the examination in fundamental engineering subjects a certificate stating that he has passed the examination and that his name has been recorded as an engineer-intraining.

The scope of the examinations and the methods of procedure shall be prescribed by the board but, with special reference to the applicant's ability to design and supervise engineering works, so as to insure the safety of life, health, and property. Examinations shall be given for the purpose of determining the qualifications of applicants for registration separately in engineering and in land surveying. A candidate failing on examination may apply for re-examination at the expiration of six months and will be

re-examined without payment of additional fee. Subsequent examinations will be granted upon payment of a fee to be determined by the board.

History: En. Sec. 15, Ch. 150, L. 1957.

66-2339. Certificates of registration—seal. The board shall issue a certificate of registration, upon payment of registration fee as provided for in this act, to any applicant who, in the opinion of the board, has satisfactorily met all the requirements of this act. In the case of a registered engineer, the certificate shall authorize the "practice of engineering." In the case of an engineer-in-training, the certificate shall state that the applicant has successfully passed the examination in fundamental engineering subjects required by the board and has been enrolled as an "engineer-intraining." In the case of a registered land surveyor, the certificate shall authorize the "practice of land surveying." Certificates of registration and certificates as engineer-in-training shall show the full name of the registrant, shall have a serial number, and shall be signed by the chairman, and the secretary of the board under seal of the board.

The issuance of a certificate of registration by this board shall be primafacie evidence that the person named therein is subject to the responsibilities and entitled to all the rights and privileges of a registered professional engineer or of a registered land surveyor, while the said certificate remains unrevoked or unexpired.

Each registrant hereunder shall upon registration obtain a seal of the design authorized by the board, bearing the registrant's name and the legend, "Registered Professional Engineer," and/or "Registered Land Surveyor." Plans, specifications, plats, and reports prepared by a registrant shall be stamped with the said seal when filed with public authorities, during the life of the registrant's certificate, but it shall be unlawful for anyone to stamp or seal any documents with said seal after the certificate of the registrant named thereon has expired or has been revoked, unless said certificate shall have been renewed or reissued.

History: En. Sec. 16, Ch. 150, L. 1957.

66-2340. Expiration and renewals—fee. Certificates of registration shall expire on the last day of the month of December following their issuance or renewal and shall become invalid on that date unless renewed; provided, however, that certificates issued after the effective date of this act and prior to January 1, 1958, shall expire December 31, 1958. It shall be the duty of the secretary of the board to notify every person registered under this act, of the date of the expiration of his certificate and the amount of the fee that shall be required for its renewal for one year; such notice shall be mailed at least one month in advance of the date of the expiration of said certificate. Renewal may be effected at any time during the month of December by the payment of a fee of five dollars (\$5.00) for either a professional engineer or land surveyor, or both. The failure on the part of any registrant to renew his certificate annually in the month of December as required above shall not deprive such person of the right of renewal, but the fee to be paid for the renewal of a certificate after the month of December shall be increased ten per cent for each month or fraction of a month that payment of renewal is delayed; provided, however, that the maximum fee for delayed renewal shall not exceed twice the normal renewal fee.

History: En. Sec. 17, Ch. 150, L. 1957.

66-2341. Persons presently registered as civil engineer and/or land surveyor. No person who heretofore has been duly registered as a civil engineer and/or land surveyor under the laws of Montana and whose registration has not been revoked shall be required to register again under this act, and his former registration shall be fully recognized under the provisions of this act. All certificates including those for engineer-in-training heretofore issued and not revoked shall have the same force and effect as if they had been issued under the provisions of this act, and shall be subject to the same rules, terms and conditions as are the certificates provided for in this act.

History: En. Sec. 18, Ch. 150, L. 1957.

66-2342. Present professional engineers—persons in military service. At any time within one year after this act becomes effective, upon application therefor and the payment of the registration fee of twenty dollars (\$20.00), the board shall issue a certificate of registration, without oral or written examination, to any professional engineer, who shall submit evidence under oath satisfactory to the board that he is of good character, has been a resident of the state of Montana for at least one year immediately preceding the date of his application; and was practicing engineering in a branch of engineering other than civil engineering and land surveying, as defined in section 66-2303, at the time this act became effective, and was performing engineering work of a character satisfactory to the board.

The board at its discretion may require applicants under this section to appear for personal interview.

After this act shall have been in effect one year, the board shall issue certificates of registration only as provided for in section 66-2336 or section 66-2345, except for individuals who are in the military service of the United States at the time this act becomes effective who were residents of this state at the time of entering such service, and who were practicing engineering immediately preceding or during said service, and have performed work of a character satisfactory to the board, for whom the provisions of this section shall apply at any time within one year after their respective honorable separations from said service.

Graduates of an approved engineering curriculum of four years or more from a school or college approved as of satisfactory standing by the engineers' council for professional development, or its successor as an agency evaluating professional engineering curricula; who are in the military service of the United States at the time this act becomes effective, shall be certified as engineers-in-training without examination, upon application therefor and payment of the fee of ten dollars (\$10.00) at any time within one year after honorable separation from such service.

For eivil engineers or land surveyors the preceding applies, except that such individuals shall have been in the military service of the United States as of July 1, 1948, as was provided in section 66-2318.

History: En. Sec. 19, Ch. 150, L. 1957.

Compiler's Note

Sections 66-2303 and 66-2318, referred to above, were repealed by Sec. 27, Ch. 150, Laws 1957.

66-2343. Engineering plans and specifications for public works. All engineering plans and specifications for public works of the state of Montana, or any agency thereof, or of any county, city, or school district of the state, shall bear the seal and signature of the engineer responsible therefor.

History: En. Sec. 20, Ch. 150, L. 1957.

66-2344. Registration of persons registered by other states or authorities. The board may, upon application therefor, and the payment of a fee of ten dollars (\$10.00), issue a certificate of registration as a professional engineer to any person who holds a certificate of qualification or registration issued to him by proper authority of the national council of state boards of engineering examiners, or of the national bureau of engineering registration, or of any state or territory or possession of the United States, or of any country, provided that the applicant's qualifications meet the requirements of this act and the rules established by the board.

History: En. Sec. 21, Ch. 150, L. 1957.

- 66-2345. Revocation of registration—hearings—reissuance of certificate—appeals. The board shall have the power to revoke the certificate of registration of any registrant who is found guilty of:
- (a) The practice of any fraud or deceit in obtaining a certificate of registration;
- (b) Any gross negligence, incompetency, or misconduct in the practice of engineering or land surveying as a registered professional engineer or land surveyor.

Any person may prefer charges of fraud, deceit, gross negligence, incompetency, or misconduct against any registrant. Such charges shall be in writing, and shall be sworn to by the person making them and shall be filed with the secretary of the board.

All charges, unless dismissed by the board as unfounded or trivial, shall be heard by the board within three months after the date on which they shall have been preferred.

The time and place for said hearing shall be fixed by the board, and a copy of the charges, together with a notice of the time and place of hearing, shall be personally served on or mailed to the last known address of such registrant, at least thirty days before the date fixed for the hearing. At any hearing, the accused registrant shall have the right to appear personally and by counsel, to cross-examine witnesses appearing against him, and to produce evidence and witnesses in his own defense.

If, after such hearing, three or more members of the board vote in favor of finding the accused guilty, the board shall revoke the certificate of registration of such registered professional engineer or land surveyor.

The board, for reasons it may deem sufficient, may reissue a certificate of registration to any person whose certificate has been revoked, providing three or more members of the board vote in favor of such reissuance. A new certificate of registration, to replace any certificate revoked, lost, destroyed, or mutilated, may be issued, subject to the rules of the board, and a charge of three dollars (\$3.00) shall be made for such issuance.

Any person who shall feel aggrieved by any action of the board in denying or revoking his certificate of registration may appeal therefrom to the district court of the county in which such denial or revocation was made, and, after full hearing, said court shall make such decree sustaining or reversing the action of the board as to it may seem just and proper.

History: En. Sec. 22, Ch. 150, L. 1957.

66-2346. Violations—penalties—enforcement of act. Any person who shall practice, or offer to practice, engineering or land surveying in this state without being registered in accordance with the provisions of this act, or any person presenting or attempting to use as his own the certificate of registration or the seal of another, or any person who shall give any false or forged evidence of any kind to the board or to any member thereof in obtaining a certificate of registration, or any person who shall falsely impersonate any other registrant of like or different name, or any person who shall attempt to use an expired or revoked certificate of registration, or any person who shall violate any of the provisions of this act, shall be guilty of misdemeanor, and shall, upon conviction, be sentenced to pay a fine of not less than one hundred dollars (\$100.00), nor more than five hundred dollars (\$500.00), or suffer imprisonment for a period not exceeding three months, or both.

It shall be the duty of all duly constituted officers of the law of this state, or any political subdivision thereof, to enforce the provisions of this act and to prosecute any persons violating same. The attorney general of the state or his assistant shall act as legal adviser of the board and render such legal assistance as may be necessary in carrying out the provisions of this act.

History: En. Sec. 23, Ch. 150, L. 1957.

66-2347. Practices to which act inapplicable. This act shall not be construed to prevent or to affect:

- (a) The practice of any other legally recognized professions or trades.
- (b) The mere execution of work by a contractor as distinguished from the planning or design thereof, or the supervision of the construction of such work as a foreman or superintendent; or
- (c) The practice of a person not a resident of and having no established place of business in this state, practicing or offering to practice herein the profession of engineering or land surveying, when such practice does not exceed in the aggregate more than thirty days in any calendar year; provided such person is legally qualified by registration to practice the said profession in his own state or country in which the requirements and qualifications for obtaining a certificate of registration are not lower than those specified in this act; or

- (d) The practice of a person not a resident of and having no established place of business in this state, or who has recently become a resident thereof, practicing or offering to practice engineering or land surveying herein for more than thirty days in any calendar year, if he shall have filed with the board an application for a certificate of registration and shall have paid the fee required by this act; provided that such a person is legally qualified by registration to practice engineering or land surveying in his own state or country in which the requirements and qualifications for obtaining a certificate of registration are not lower than those specified in this act. Such practice shall continue only for such time as the board requires for the consideration of the application for registration; or
- (e) The performance of professional engineering functions or work by a person who is an employee of or acts under the supervision and direction of a professional engineer, provided such person is not in responsible charge of such engineering work: or
- (f) The practice of professional engineering by licensed architects where such practice is purely incidental to their practice of architecture, or
- The practice of officers and employees of the government of the United States while engaged within this state in the practice of engineering or land surveying, for said government, or
- (h) The practice of professional engineering or land surveying in this state by a firm, copartnership, corporation or joint stock association, or by its members, officers or employees on its behalf, provided each person in responsible charge of activities of the firm, copartnership, corporation or joint stock association which constitutes such practice is a professional engineer or land surveyor respectively, holding a certificate of registration under this act.

History: En. Sec. 24, Ch. 150, L. 1957.

Transfer of Funds

Section 28 of Ch. 150, Laws 1957 read "The balance of the money in the state treasury in the civil engineers' fund, as was provided for in section 66-2310, Revised Codes of Montana, 1947, shall upon the effective date of this act be transferred to the professional engineers' fund as provided in section 10 of this act."

CHAPTER 24

PLUMBERS

Plumbers-license required-exception. Section 66-2401. Application for state license. 66-2402. Board of plumbing examiners-appointment-terms-compensation-66-2403. examination of applicants. Application for license-information required-firms or corporations. 66-2404. Examination fee-expiration of license-annual renewal-fees-bond 66-2405. required of master plumbers.

Apprentices—rules and regulations—record kept by state board. 66-2406. 66-2407. Disposition of license fees. 66-2408. Revocation of license. Quorum of board-rules and regulations. 66-2409. Present licensed plumbers-license without examination-fees. 66-2410. Penalty for violations—exceptions from act. 66-2411. 66-2412. Declaration of public interest. Board of plumbing examiners to constitute state plumbing board. 66-2413. Rules and records of board—chairman—employees. Act not to require employment of licensed plumbers. 66-2414. 66-2415.

66-2417. District court—jurisdiction—restraining orders.

66-2418. Expenses-defraving.

66-2419. Revocation or suspension of license for work below minimum standards.

66-2420. Revocation or suspension-initiation of proceedings-procedure.

66-2421. Process and proof of service-appearance of accused.

66-2422. Hearing on revocation or suspension of license-procedure-sub-

66-2423. Judicial review of revocation or suspension—jurisdiction. 66-2424. Municipal ordinances for plumbing standards—authority.

66-2425. Effective date of state plumbing code. 66-2426. Exceptions from act.

66-2401. Plumbers—license required—exception. Any person working at the business of plumbing, in any incorporated city or town in this state, either as a master plumber or as a journeyman plumber, or who, while working at the business of plumbing, shall connect plumbing to or disconnect plumbing from, a water or sewer system of such a city or town, which serves the public, shall first secure a state license as hereinafter provided. Provided that the council or commission of any city or town, in cases where a duly licensed person is not reasonably available, may, by ordinance duly adopted, and upon reasonable notice to the board of plumbing examiners, authorize the practice of the business of plumbing by persons who have not obtained the state licenses as hereinafter provided until such time as a duly licensed person is reasonably available.

History: En. Sec. 5, Ch. 203, L. 1949; amd. Sec. 1, Ch. 185, L. 1961.

53 C.J.S. Licenses § 30.

Collateral References Licenses \$\infty\$13.

Validity of regulations as to plumbers and plumbing. 22 ALR 2d 816.

DECISIONS UNDER FORMER LAW

Municipal Maintenance Employees

This section did not (before the 1961 amendment) contemplate the licensing of city employees for work done in constructing, maintaining and operating of its water systems. Leischner v. Knight, 135 M 109, 337 P 2d 359.

66-2402. Application for state license. Any such person desiring to work at the business of plumbing in any such city or town shall file his application for a state license with the secretary of the board of plumbing examiners of the state of Montana, and shall at such time and place as may be designated by the board of examiners of plumbers of the state of Montana, be examined as to his qualifications for working in such business.

History: En. Sec. 2, Ch. 203, L. 1949. Collateral References Licenses = 22. 53 C.J.S. Licenses § 39.

66-2403. Board of plumbing examiners—appointment—terms—compensation—examination of applicants. Within sixty days after this act becomes a law, the governor of the state of Montana shall appoint a board of plumbing examiners consisting of five members—one master plumber, one journeyman plumber, who shall be of legal age, residents of Montana for more than one year and shall have been at least five out of the last eight years, immediately preceding their appointment, duly licensed master or journeyman plumbers, one registered professional engineer, qualified in

mechanical engineering, one member to be appointed at large as representative of the public who is not engaged in the business of installing or selling plumbing equipment, and the appointed representative of the Montana state board of health, who shall be a sanitary engineer and who shall be the secretary of the state board of plumbing examiners. The office of the engineer of the state board of health shall act as the office through which all business of the board shall be transacted. The appointed members of this board of plumbing examiners shall serve for a period of four years from the date of their appointment, providing however, the first board of plumbing examiners shall serve as follows: one member for one year, one member for two years, one member for three years and one member for four years and the governor in making the appointment shall designate the time that each member constituting the first board shall serve. Thereafter, upon the expiration of the term of office of each member of the board of plumbing examiners or when a vacancy occurs, the governor shall make a new appointment for the unexpired term or for a period of four years. The journeyman plumber whose term would next expire after passage and approval of this act is hereby removed from said board and in his place and stead shall be installed said registered professional engineer, qualified in mechanical engineering. The members of the said board shall be entitled to a compensation of twenty dollars per diem, each, for each and every day while actually engaged in the work of the board, the compensation, however, to be paid from the revenue realized under the provisions of this act, but not otherwise. Any applicant for a state license to work at the business of plumbing in this state shall be examined as to his qualifications by the board of examiners of plumbers for the state of Montana. It shall be the duty of the said board to examine each applicant for a state license as provided for in this act, to determine his qualifications and fitness for carrying on the business of a master plumber or journeyman plumber, and if the applicant successfully passes the examination as prescribed by the said board, then a state license shall be issued to such applicant for such license, authorizing him to engage in the business and occupation of a master plumber or journeyman plumber, as the case may be, which license, when issued, shall authorize the holder thereof to carry on the business of a master plumber or a journeyman plumber, as the case may be, in any city or town in the state of Montana.

History: En. Sec. 3, Ch. 203, L. 1949; amd. Sec. 16, Ch. 251, L. 1959; amd. Sec. 2, Ch. 185, L. 1961.

Collateral References Licenses 21. 53 C.J.S. Licenses § 38.

66-2404. Application for license—information required—firms or corporations. Any person, firm, or corporation desiring to engage in or work in the business of plumbing, either as a master plumber or as a journeyman plumber, in this state, shall apply to the secretary of said board of plumbing examiners, by filing a written application with the secretary of the board, stating his place of residence, age, experience, and the place where he has acquired his experience, and shall at such time and place as may be designated by the said board, as herein provided for, be examined as to his qualifications for said license. In the case of a firm or corporation, the examination and issuing of a state license to any one member of the firm, or to the

manager of the corporation, shall satisfy the requirements of this act as to master plumbers, but not as to journeymen plumbers; provided, however, that no person shall do the work of a master plumber unless licensed as provided for in this act.

History: En. Sec. 4, Ch. 203, L. 1949.

Collateral References Licenses \$22. 53 C.J.S. Licenses \$39.

66-2405. Examination fee—expiration of license—annual renewal—fees -bond required of master plumbers. No applicant for a master plumber's license shall be entitled to submit to the examinations prescribed by the said board of plumbing examiners until he shall have deposited with the secretary of the said board the sum of twenty-five dollars as an examination fee, and no applicant for a journeyman plumber's license shall be entitled to submit to the examination prescribed by the said board of plumbing examiners until he shall have deposited with the secretary of said board the sum of ten dollars as an examination fee. Each state license when issued shall expire one year from the date of its issuance, and shall have no force or effect after the expiration of one year after the date of its issuance. Any state license, however, issued to a master plumber or a journeyman plumber shall be renewed annually, without examination, at any time prior to its expiration, by a written request for its renewal, directed to the secretary of the said board of plumbing examiners, and the payment of the sum of ten dollars for a renewal of a master plumber's license, and the sum of five dollars for a journeyman plumber's license, and any such renewal shall also be for the period of one year. After July 1, 1961, no master plumber's license shall be issued or renewed unless and until the applicant therefor shall have deposited with the board a good and sufficient bond to be approved by the board, or cash in lieu thereof, in the amount of five thousand dollars (\$5,000.00) to insure the faithful performance of his duties arising out of the provisions of the state plumbing code or the provisions of chapter 24, Title 66, Revised Codes of Montana.

History: En. Sec. 5, Ch. 203, L. 1949; amd. Sec. 3, Ch. 185, L. 1961.

Collateral References
Licenses \$29.
53 C.J.S. Licenses § 48.

66-2406. Apprentices — rules and regulations — record kept by state board. Nothing in this act shall prohibit any person from working as an apprentice in said trade of plumbing with a plumber duly licensed by said board as herein provided for, and under such rules and regulations as may be prescribed from time to time by said board of plumbing examiners; provided, the name and residence of each apprentice, and the names and residences of their employers, shall be duly filed with said board, and a record shall be kept by said board, showing the names and residences of such apprentices.

History: En. Sec. 6, Ch. 203, L. 1949.

66-2407. Disposition of license fees. All moneys paid for state license fees as provided for in this act shall be placed in the custody of the state treasurer, who shall keep such sums in a distinct fund, and any moneys in

such fund shall be applied in defraying any expenses incurred by the state board of examiners of plumbers in carrying out the provisions of this act.

History: En. Sec. 7, Ch. 203, L. 1949.

Collateral References
Licenses \$33.
53 C.J.S. Licenses \$56.

66-2408. Revocation of license. The state license and permit granted as herein provided may be at any time revoked for incompetency, dereliction of duty, or other sufficient cause, after a full and fair hearing by said board.

History: En. Sec. 8, Ch. 203, L. 1949.

Collateral References Licenses©=38. 53 C.J.S. Licenses § 44.

66-2409. Quorum of board—rules and regulations. A majority of said board of plumbing examiners shall constitute a quorum for the purpose of transacting any and all business that may come before the board. This said board of plumbing examiners is hereby authorized to adopt such rules and regulations as are necessary to carry out the intent of this act.

History: En. Sec. 9, Ch. 203, L. 1949.

66-2410. Present licensed plumbers—license without examination—fees. All master and journeymen plumbers, who are now holders of a city license shall be entitled to a state license, to be issued by said board of plumbing examiners immediately after its organization as provided for by this act, without submitting or being required to submit to any examination whatever, upon the payment by each of the applicants for such license of the sum of twenty-five dollars in the case of the master plumber, and ten dollars in the case of a journeyman plumber, and such license, when issued, shall be renewed from time to time annually as hereinbefore provided.

History: En. Sec. 10, Ch. 203, L. 1949.

Collateral References Licenses©-13. 53 C.J.S. Licenses § 30.

66-2411. Penalty for violations—exceptions from act. Any person working at the business of plumbing or maintaining or conducting a plumbing shop in any incorporated city or town in this state, or who, while working at the business of plumbing, shall connect plumbing to or disconnect plumbing from, a water or sewer system of such a city or town, which serves the public, in violation of any provisions of this act, or at a time when he is not exempt from the provisions of this act pursuant to the provisions of a duly enacted and subsisting ordinance of such city or town shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court of competent jurisdiction, shall be punished by a fine of not less than ten dollars and not more than one hundred dollars for each separate offense; provided, however, that this act shall not be construed to apply to, or affect, plumbing or pipefitting in any smelter, mine, railroad or manufacturing industry, and that nothing herein shall be construed to affect article VI of the state of Montana plumbing code, rules and regulations.

History: En. Sec. 11, Ch. 203, L. 1949; amd. Sec. 4, Ch. 185, L. 1961.

Collateral References Licenses \$\infty 41. 53 C.J.S. Licenses \$ 62.

66-2412. Declaration of public interest. It is hereby declared that the public health and welfare require that minimum standards for the planning, installing, altering, extending, repairing and maintaining of plumbing systems be established for the protection of the people of the state.

History: En. Sec. 1, Ch. 251, L. 1959.

66-2413. Board of plumbing examiners to constitute state plumbing board. The board of plumbing examiners shall also constitute and be the state plumbing board which is hereby vested with the powers and duties hereinafter enumerated.

History: En. Sec. 2, Ch. 251, L. 1959.

66-2414. Rules and records of board — chairman — employees. The board shall adopt rules for the transaction of its business and shall keep a record of its official actions. It shall annually select a chairman from its members. The board may employ a secretary who need not be a member of the board and such other persons as may be necessary for its work.

History: En. Sec. 3, Ch. 251, L. 1959.

66-2415. Act not to require employment of licensed plumbers. Nothing in this act shall be construed as requiring that licensed plumbers be employed in the performance of any plumbing work.

History: En. Sec. 4, Ch. 251, L. 1959.

66-2416. Minimum standards—state plumbing code—fee for copy of code. The state plumbing board shall, by regulation, prescribe minimum standards which shall be uniform and which standards shall thereafter be effective for all new plumbing installations; such regulations shall contain the minimum requirements for plumbing as set forth in the American standard national plumbing code, numbered ASA A40.8-1955, and published by the American society of mechanical engineers. Such regulations, upon approval of the state board of health and the attorney general and their legal publication, shall be the state plumbing code and shall have the force of law. A copy of the code shall be supplied to each person licensed under the provisions of Title 66, chapter 24 [66-2401 to 66-2411] of the laws of the state of Montana, or any other interested person, for a fee of no more than five dollars (\$5.00).

History: En. Sec. 5, Ch. 251, L. 1959.

ferred to in this section, comprised sections 66-2401 to 66-2411.

Compiler's Note

Prior to the enactment of Chapter 251 of Laws of 1959, Title 66, Chapter 24, re-

66-2417. District court—jurisdiction—restraining orders. The district court of any county of the state shall have jurisdiction in equity, upon application of said state plumbing board or said state board of health, to

enforce this act and to restrain from connection any new plumbing installations, upon finding, after hearing thereupon, that said plumbing is inferior to the standards of said state plumbing code.

History: En. Sec. 6, Ch. 251, L. 1959.

66-2418. Expenses—defraying. Any moneys paid for state license fees for state plumber licenses, as provided for in Title 66, chapter 24 [66-2401 to 66-2411] of the laws of the state of Montana, may be applied in defraying the expense of the board in carrying out the provisions of this act.

History: En. Sec. 7, Ch. 251, L. 1959.

ferred to in this section, comprised sections 66-2401 to 66-2411.

Compiler's Note

Prior to the enactment of Chapter 251 of Laws 1959, Title 66, Chapter 24, re-

66-2419. Revocation or suspension of license for work below minimum standards. Any person, firm, or corporation licensed under the provisions of Title 66, chapter 24 [66-2401 to 66-2411] of the laws of the state of Montana who performs plumbing work in any building whatsoever, below the minimum basic standards for plumbing as set forth in said state plumbing code shall have their license revoked or suspended by the state plumbing board.

History: En. Sec. 8, Ch. 251, L. 1959.

ferred to in this section, comprised sections 66-2401 to 66-2411.

Compiler's Note

Prior to the enactment of Chapter 251 of Laws 1959, Title 66, Chapter 24, re-

66-2420. Revocation or suspension—initiation of proceedings—procedure. Proceedings for the revocation or suspension of a plumber's license may be taken by the board upon its initial motion, for matters within its knowledge, or may be taken upon the information of another. All accusations must be in writing, verified by some party familiar with the facts therein charged, and three copies thereof must be filed with the secretary of the board. Upon receiving the accusation the board shall, if it deem the accusation sufficient, make an order setting the same for hearing, and requiring the accused to appear and answer such charge or accusation at said hearing, at a specified time and place in the county wherein the alleged violation occurred, and the secretary shall cause a true copy of said order of the board and of the accusation or charge to be served upon the accused at least ten (10) days before the day appointed in the order for said hearing.

History: En. Sec. 9, Ch. 251, L. 1959.

66-2421. Process and proof of service—appearance of accused. Process issued by the board, and proof of service shall be made as provided in civil cases in courts of record and shall be filed with the secretary of the board. The accused must appear at the time appointed in the order and answer the charges and make his defense to the same, unless for sufficient cause, upon the accused's application or the board's order, the board assign another day for that purpose.

History: En. Sec. 10, Ch. 251, L. 1959.

subpoenas. If the accused does not appear the board may proceed and determine the accusation in his absence. If the accused confess the accusation or refuse to answer the charge, or upon the hearing thereof, the board shall find the charge or accusation (whether one or more) true, it may proceed to an order either revoking the license of the accused or suspending it for a fixed period. The board and the accused may have the benefit of counsel, and the board shall have the power to administer oaths, take depositions of witnesses in the manner provided by law in civil cases, and to issue subpoenas for the attendance of witnesses and the producing of papers, books, accounts, documents and testimony in any inquiry, investigation, hearing or proceeding in any part of the state. Such subpoena shall be issued over the signature of the secretary of the board and in the name of the state of Montana.

History: En. Sec. 11, Ch. 251, L. 1959.

66-2423. Judicial review of revocation or suspension—jurisdiction. In case of revocation or suspension of a license by said board, the licensee whose license shall have been revoked by said board, shall have the right to judicial review of said revocation or suspension by commencing proper proceedings therefor within thirty (30) days of the filing of the order of cancellation or revocation of said license. Such review shall be in the district court in and for the county in which was held the meeting of the board in which such order of revocation or suspension was made.

History: En. Sec. 12, Ch. 251, L. 1959.

66-2424. Municipal ordinances for plumbing standards—authority. Any municipality of the state of Montana may by ordinance adopt rules and regulations governing plumbing, drainage and ventilation of plumbing within its corporate limits, but the standards provided for therein shall not be less nor lower than the minimum standards provided for them in the state plumbing code.

History: En. Sec. 13, Ch. 251, L. 1959.

66-2425. Effective date of state plumbing code. The state plumbing code shall be in full force and effect thirty (30) days after the mailing by said board of a copy of the state plumbing code to each person holding a license under the provisions of Title 66, chapter 24 [66-2401 to 66-2411] of the laws of the state of Montana; provided, however, said code shall be mailed not later than the first day of August 1959.

History: En. Sec. 14, Ch. 251, L. 1959. ferred to in this section, comprised sections 66-2401 to 66-2411.

Prior to the enactment of Chapter 251 of Laws 1959, Title 66, Chapter 24, re-

66-2426. Exceptions from act. This act shall not be construed to apply to, or to affect, plumbing installations in any mines, mills, smelters, refineries, reduction works, public utilities, manufacturing industries, or plumbing installations on farms having their own individual water supply or sewage disposal system.

History: En. Sec. 15, Ch. 251, L. 1959.

CHAPTER 25

PHYSICAL THERAPISTS PRACTICE ACT

Section 66-2501. Definitions. 66-2502. Qualifications of applicants for license. Application for examination—examination fee. 66-2503. 66-2504. Licensing of present therapists. Applicants licensed in another state. 66-2505. 66-2506. Examination of applicants—scope. 66-2507. Issuance of license—certificate as evidence. 66-2508. Annual extension of license. 66-2509. Refusal to issue or renew license-grounds. 66-2510. Temporary licenses. 66-2511.

Unauthorized representation as licensed therapist.

66-2512. False oath or affirmation—fraudulent representation to obtain license. Restrictions on scope of practice—other professions unaffected. 66-2513. Rules adopted by board—records of proceedings and licensees. Investigation and report of violations. 66-2514.

66-2515.

Penalties for violations. 66-2516.

66-2517. Short title.

66-2501. Definitions. In the act, unless the context otherwise required:

- "Physical Therapy" means the treatment of any bodily or mental condition of any person by the use of the physical, chemical and other properties of heat, light, water, electricity, massage, and therapeutic exercise including physical rehabilitation procedures. The use of roentgen rays and radium for diagnostic and therapeutic purposes, and the use of electricity for surgical purposes, including cauterization, are not authorized under the term "physical therapy" as used in the act.
- (2) The term "Physical Therapist" means a person who practices physical therapy as defined in this act.
 - "Board" means the board of medical examiners.
 - Words importing the masculine gender may be applied to females. Collateral References History: En. Sec. 1, Ch. 39, L. 1961. 70 C.J.S. Physicians and Surgeons § 1.

Qualifications of applicants for license. To be eligible for a license from the board as a physical therapist an applicant must:

- Be at least twenty-one years old: (1)
- Be of good moral character: (2)
- Have been graduated from a school of physical therapy approved by the council of medical education and hospitals of the American Medical Association:
- (4) Either (a) pass to the satisfaction of the board an examination conducted by it to determine his fitness for practice as a physical therapist; or, (b) be entitled to a license without examination as provided by section 66-2505 or 66-2506.

History: En. Sec. 2, Ch. 39, L. 1961.

66-2503. Application for examination—examination fee. Unless entitled to a license under section 66-2504 or 66-2505, a person who desires to be licensed as a physical therapist shall apply to the board, in writing, on a blank furnished by the board. He shall embody in that application

evidence under oath, satisfactory to the board, of his possessing the qualifications preliminary to examination required by section 66-2502. He shall pay to the secretary of the board of medical examiners at the time of filing his application a fee of twenty-five dollars (\$25.00). This fee will become part of the board of medical examiners' fund and shall not be used or expended for any purpose other than as provided for in section 66-1009. Anyone failing to pass the required examination shall be entitled to a second examination within six months without additional fee.

History: En. Sec. 3, Ch. 39, L. 1961.

- 66-2504. Licensing of present therapists. The board shall license as a physical therapist any qualified person who
 - (1) applies for such license on or before September 30, 1961; and who
- (2) at the time of the passage of this act is a member of or is eligible for membership in the American Physical Therapy Association and/or the American Registry of Physical Therapists; and
- (3) is practicing physical therapy in the state of Montana and was so practicing at the time of the passage of this act.

At time of making such application such applicant shall pay the board a fee of five dollars (\$5.00).

History: En. Sec. 4, Ch. 39, L. 1961.

66-2505. Applicants licensed in another state. The board may, in its discretion register as a physical therapist, without examination, on the payment of the required twenty-five dollars (\$25.00) fee, an applicant for license who is a physical therapist licensed under the laws of another state or territory, if the requirements for a license for physical therapist in the state or territory in which the applicant was licensed were at the date of his license substantially equal to the requirements in force in this state.

History: En. Sec. 5, Ch. 39, L. 1961.

66-2506. Examination of applicants—scope. The board shall examine applicants for a license as physical therapists at such times and places as it may determine. It shall appoint two registered physical therapists to aid it in such examinations. The examinations shall embrace such subjects as the board deems necessary to determine the applicant's fitness.

History: En. Sec. 6, Ch. 39, L. 1961.

66-2507. Issuance of license—certificate as evidence. The board shall license as a physical therapist each applicant who proves to the satisfaction of the board his fitness for a license under the terms of this act. It shall issue to each person licensed a license certificate, which shall be primafacie evidence of the right of the person to whom it is issued to represent himself as a licensed physical therapist, subject to the conditions and limitations of the act.

History: En. Sec. 7, Ch. 39, L. 1961.

66-2508. Annual extension of license. Every licensed physical therapist shall, during January, 1962, and during every January thereafter,

apply to the board for an extension of his license and pay a fee of two dollars (\$2.00). A license that is not so extended, in the first instance before April 1, 1962, and thereafter before April, every year, shall automatically lapse. The board may in its discretion revive and extend a lapsed license on the payment of all past unpaid extension fees.

History: En. Sec. 8, Ch. 39, L. 1961.

- 66-2509. Refusal to issue or renew license—grounds. The board, after due notice and hearing, may refuse to license any applicant, and may refuse to renew the license of any licensed person:
- (1) Who is habitually intoxicated or who is addicted to the use of narcotic drugs;
- (2) Who has been convicted of violating any state or federal narcotic law:
- (3) Who is, in the judgment of the board, guilty of immoral or unprofessional conduct;
 - (4) Who has been convicted of any crime involving moral turpitude;
- (5) Who is guilty, in the judgment of the board, of gross negligence in his practice as a physical therapist;
- (6) Who has obtained or attempted to obtain registration by fraud or material misrepresentation;
- (7) Who has been declared insane by a court of competent jurisdiction and has not thereafter been lawfully declared sane;
- (8) Who has treated or undertaken to treat ailments of human beings otherwise than by physical therapy, or who has undertaken to practice physical therapy independent of prescription from a person who holds an unlimited license to practice medicine and surgery in the state of Montana and other states and territories.

History: En. Sec. 9, Ch. 39, L. 1961.

66-2510. Temporary licenses. On payment to the board of a fee of ten dollars (\$10.00), and the submission of a written application on forms provided by it, the board shall issue without examination a temporary license to practice physical therapy in this state for a period not to exceed one year to any person who meets the qualifications set forth in section 66-2502 upon submission by such person of evidence satisfactory to the board that he is in this state on a temporary basis to assist in a case of medical emergency or to engage in a special physical therapy project. Upon the submission of a written application on forms provided by it, the board shall also issue a temporary license to a person who has applied for a license under the provisions of this act and who is, in the judgment of the board, eligible to take the examination provided for in section 66-2502. Such temporary license shall be available to an applicant only with respect to his first application for a license under section 66-2505 and such license shall expire when the board makes a final determination with respect to said application.

History: En. Sec. 10, Ch. 39, L. 1961.

66-2511. Unauthorized representation as licensed therapist. A person who is not licensed under this act as a physical therapist, or whose license

has been suspended or revoked, or whose license has lapsed and has not been revived, who uses in connection with his name the words or letters "L. P. T.," "Licensed Physical Therapist," or any other letters, words or insignia indicating or implying that he is a licensed physical therapist, or who in any way, orally, or in writing, or in print, or by sign, directly or by implication, represents himself as a physical therapist shall be guilty of a misdemeanor.

History: En. Sec. 11, Ch. 39, L. 1961.

66-2512. False oath or affirmation—fraudulent representation to obtain license. A person who makes a willfully false oath or affirmation in any case in which an oath or affirmation is required by this act, or who obtains or attempts to obtain a license by any fraudulent representation shall be guilty of a misdemeanor.

History: En. Sec. 12, Ch. 39, L. 1961.

66-2513. Restrictions on scope of practice—other professions unaffected. Nothing in this act shall be construed as authorizing a physical therapist, whether licensed or not, to practice medicine, osteopathy or chiropractic; nor shall this act be construed to limit or regulate any other business or profession or any services rendered or performed in connection therewith, including osteopathy, chiropractic, chiropractic physiotherapy, massage therapist, masseurs, or Swedish masseurs.

History: En. Sec. 13, Ch. 39, L. 1961.

66-2514. Rules adopted by board—records of proceedings and licensees. The board is authorized to adopt reasonable rules to carry this act into effect and may amend and revoke such rules at its discretion. The board shall keep a record of its proceedings under this act and a register of all persons licensed under it. The register shall show the name of every living licensed physical therapist, his last known place of business and last known place of residence, and the date and number of his license and certificate as a licensed physical therapist. The board shall, during the month of April every year in which the renewal of licenses is required, compile a list of licensed physical therapists authorized to practice physical therapy in the state and shall mail a copy of that list to every superintendent of every known hospital and every person licensed to practice medicine and surgery in the state. Any interested person in the state is entitled to obtain a copy of that list on application to the board, which amount shall not exceed the cost of the list so furnished.

History: En. Sec. 14, Ch. 39, L. 1961.

66-2515. Investigation and report of violations. The board shall investigate every supposed violation of this act coming to its notice and shall report to the proper authority all cases that in the judgment of the board warrant prosecution.

History: En. Sec. 15, Ch. 39, L. 1961.

66-2516. Penalties for violations. Any person who knowingly violates any provisions of this act shall be guilty of a misdemeanor and upon con-

viction thereof shall be punished by a fine not less than fifty dollars (\$50.00) or more than five hundred dollars (\$500.00) or by imprisonment in the county jail for a term of not less than thirty (30) days or more than six (6) months, or by both such fines and imprisonment.

History: En. Sec. 16, Ch. 39, L. 1961.

66-2517. Short title. This act may be cited as the "Physical Therapists Practice Act."

History: En. Sec. 19, Ch. 39, L. 1961.

CHAPTER 26

WATER WELL CONTRACTOR'S LICENSE ACT

Section 66-2601. Title of the act.

66-2602. Purpose of the act—definitions—exemptions.

66-2603. Water well drilling is a business.

66-2604. Water well contractor's examining board—members—terms—oath—seal—employees.

66-2605. Powers and duties of the board. 66-2606. Water well contractor's licenses.

66-2607. License year.

66-2608. Examination and qualifications.

66-2609. Bond to be required.

66-2610. Revocation and suspension.

66-2611. Appeals.

66-2612. No action or counterclaim to be maintained except by licensee.

66-2613. Penalties.

66-2614. Repeal clause-construction of act.

66-2601. Title of the act. This act may be cited as the "Montana Water Well Contractor's License Act."

History: En. Sec. 1, Ch. 176, L. 1961.

66-2602. Purpose of the act—definitions—exemptions. It is the legislative intent and purpose in this enactment to reduce and minimize the waste of ground water resources within this state by reasonable regulation and licensing of drillers or makers of water wells in Montana and to protect the health and general welfare by providing a means for the development of the natural resource of underground water in an orderly, sanitary and reasonable manner. The reasonable regulation and licensing of drillers or makers of water wells is hereby deemed and declared to be in the best interest of the public, and the waste of ground water resources through inefficient and/or incompetent operations of drillers or makers of such water wells is hereby prohibited. Further, for the protection of the public and for the conservation of underground water resources, it is deemed necessary that standards be set and maintained to insure that competency in the drilling and making of water wells in this state is obtained.

For the purposes of this act, "water well" means any excavation that is drilled, cored, bored, washed, driven, dug, jetted or otherwise constructed when the intended use of the same is for the location, diversion, artificial recharge, or acquisition of ground water; provided, however, that the term "water well" does not include excavations by back-hoe, or otherwise, for recovery and use of surface waters where the depth thereof is twenty-five

(25) feet or less; provided further, however, that this term does not include an excavation made for the purpose of obtaining or prospecting for oil, natural gas, minerals or products of mining or quarrying or for inserting media to repressure oil or natural gas bearing formations or for storing petroleum, natural gas or other products; for the purposes of this act, "water well contractor" and "contractor" mean any person, firm, copartnership, association, or corporation, who shall construct a water well upon lands other than his own, for compensation.

This act shall not apply to (1) an individual who drills a water well on land which is owned or leased by him and is used by him for farming, ranching or agricultural purposes or as his place of abode, or (2) to an individual who performs labor or services for a licensed water well contractor in connection with the drilling of a water well at the direction and under the personal supervision of a licensed water well contractor.

History: En. Sec. 2, Ch. 176, L. 1961.

66-2603. Water well drilling is a business. The drilling, making or construction of water wells into the ground water resources of this state is declared to be a business and activity affecting the public interest, requiring reasonable standards of competence. It shall be unlawful for any person, as defined in this act, to construct a water well without first having obtained a valid license therefor as provided for herein.

History: En. Sec. 3, Ch. 176, L. 1961.

- 66-2604. Water well contractor's examining board—members—terms—oath—seal—employees. (1) There is hereby created the water well contractor's examining board of the state of Montana.
- (2) The water well contractor's examining board of the state of Montana shall be composed of three (3) persons. One (1) of said persons shall be the state engineer, appointed, qualified and acting pursuant to the provisions of section 81-2006; one (1) of said persons shall be the director of the division of environmental sanitation of the state board of health of the state of Montana; and one (1) of said persons shall be appointed by the governor with the concurrence of the state senate. In making this appointment, the governor may consider recommendations made to him by the Montana water well drillers association, and shall be from the water well drilling industry. The appointive member of the said board shall serve for a term of three (3) years. In case of a vacancy in the office of a member of the board, an appointment shall be made to fill the same in the manner prescribed by the constitution and the laws of this state. appointive member of the board shall have been a bona fide resident of this state for a period of at least three (3) years prior to such appointment and shall have had at least five (5) years' experience in the water well drilling business.
- (3) The appointive member of the board shall, upon entering on the duties of his office, take and subscribe to the oath specified in section 1, article XIX, of the constitution of the state of Montana, and such oath shall be filed in the office of the secretary of state of the state of Montana.
- (4) The board shall have a seal with the words engraved thereon: "Water Well Contractor's Examining Board," and such seal shall be affixed

to all writs, authentication of records, and other official proceedings of the board. The courts of this state shall take judicial notice of such seal.

(5) The board may, in its discretion, employ a secretary and such other persons as may be necessary to perform the duties of the board, either upon a part time basis or upon a full time basis. Payment for any such services shall be made out of the hereinafter designated fund, and no other. The appointed member of the board shall receive, as compensation for his services, the sum of fifteen dollars (\$15.00) per day for each day actually engaged in the performance of the duties of his office, including time of travel between his home and the places at which he shall perform such duties, together with mileage and per diem expenses as provided by law. Such payments to the appointed member of compensation, mileage and per diem expenses shall be made out of the hereinafter designated fund, and no other. The state engineer and the director of environmental sanitation of the state board of health of the state of Montana shall receive no extra compensation for their services as members of the board.

History: En. Sec. 4, Ch. 176, L. 1961.

66-2605. Powers and duties of the board. (1) The board has jurisdiction to exercise effectively the authority granted to it by this act.

- (2) The board has authority, and it is its duty, to promulgate, publish and enforce reasonable rules and regulations and orders to effectuate the purposes and intent of this act as expressed herein.
- (3) The board, or its authorized representative, shall have the power and authority to inspect water wells drilled, or drilling, and shall have access to the same at all reasonable times.
- (4) The board shall have authority to establish a program, or programs, of training water well drillers or prospective water well drillers and apprentices, the more effectively to carry out the purposes and intent of this act.
- (5) Within one hundred twenty (120) days of the effective date of this act, the board shall organize and conduct a public hearing for the purpose of adopting reasonable rules and regulations for the future conduct of its business. Such hearing shall be had only after at least ten (10) days' printed notice of the same has been given, announcing the hearing, the time, the place and the purpose therefor. Publication shall be made in at least five (5) daily newspapers in this state. Following such hearing, said rules and regulations shall be adopted and compiled in printed form for distribution to interested persons. The board shall charge a fee of fifty cents (50¢) per copy, and sums realized from such sales shall be deposited with the treasurer of this state in a special fund to be designated as the "Water Well Contractor's Examining Board Fund," and the funds therein shall be used for the purpose of paying expenses of the board, and for no other purpose. All sums expended from this fund shall be approved as provided by law. Upon termination of this board, any balance remaining in said fund shall be paid over to the general fund of the state of Montana. All accounts and expenditures of said board shall be certified by the board, approved by the board of examiners of the state of Montana, and

paid by the state treasurer upon warrants drawn by the state auditor out of said fund.

(6) The board has authority, and it is its duty, to issue licenses to qualified water well contractors in this state; to cause examination to be made of applicants for licenses; to revoke or suspend licenses upon good cause shown after their issuance, after notice to the person affected and an opportunity for him to be heard; to reinstate licenses previously revoked when justification therefor is shown to the satisfaction of the board; and, generally, to perform any and all duties which will carry out the purposes and intent of this act as expressed herein.

History: En. Sec. 5, Ch. 176, L. 1961.

Water well contractor's licenses. Any person desiring to engage in the drilling, making or construction of one (1) or more wells for underground water in this state shall first file an application with the board for a contractor's license, setting out his qualifications therefor, the equipment proposed to be used in such contracting, and such other business as may be required by the board, all upon forms to be adopted by the The board shall charge a fee of one hundred dollars (\$100.00) for the filing of such application by any person, and it shall not act upon any application until such fee has been paid. All fees collected hereunder shall be deposited with the state treasurer in the "Water Well Contractor's Examining Board Fund," and shall be used to pay expenses of the board as set forth in this act, and for no other purpose. A license to construct water wells shall be issued to any applicant if, in the opinion of the board, such applicant is qualified to conduct water well construction operations. In the granting of such licenses, the board shall have due regard for the interest of the state of Montana in the protection of its underground waters. Applicants for licenses hereunder who have engaged in the business of water well drilling or construction for a period of more than three (3) years prior to the effective date of this act, and who have been bona fide residents of the state of Montana for more than one (1) year preceding the date of application, may, at any time within one (1) year after the effective date of this act make application for license hereunder and payment of the fee of one hundred dollars (\$100.00), as herein provided, and the board shall issue a license to any such applicant without examination, when he shall submit evidence, under oath, satisfactory to the board that he is of good character, that he was engaged in the occupation of water well contractor at the time this act became effective, and that his work as such is satisfactory to the board. All other applicants shall be subject to examination as hereinafter provided.

History: En. Sec. 6, Ch. 176, L. 1961.

66-2607. License year. The term for licenses issued under the terms and provisions of this act shall be from the 1st day of July of each year through the following 30th day of June. After the payment of the initial fee, as provided for in section 66-2606, each licensee hereunder shall pay, on or before the first day of each license year, a renewal fee of twenty-five dollars (\$25.00). If a licensee shall not have applied for renewal of his

license before the first day of any license year and remitted to the board the necessary renewal fee, he shall have his license suspended by the board; and, if said license remains so suspended for a period of more than thirty (30) days after the first day of any license year, it shall be revoked by the board; provided, however, that the board, prior to such revocation, shall notify the licensee of its intention to revoke at least ten (10) days prior to the time set for action to be taken by the board on such license, by mailing notice of the same to the licensee at the address appearing for such licensee in the records and files of the board, through United States mail, postage prepaid. A license, once revoked, may not be reinstated unless it shall appear that an injustice has occurred through error or omission, or other fact or circumstance indicating to the board that the licensee was not guilty of negligence or laches. A person whose license has been revoked, through his own fault, if he desires to engage in the business of water well drilling in this state, or contracting therefor, must make application as provided for in section 66-2606, and the "without examination" proviso contained therein shall not apply to him. Notice of suspension shall be given a licensee when such suspension occurs.

History: En. Sec. 7, Ch. 176, L. 1961.

66-2608. Examination and qualifications. Under such reasonable rules and regulations pertaining to the business of drilling and contracting for drilling of water wells as the board shall adopt, it shall have the power and it shall be its duty to investigate, by examination or otherwise, into the qualifications of applicants for licenses to drill or make wells for production therefrom of underground waters in this state. Examinations by the board may be oral or written or both. The qualifications to be required by the board hereunder are as follows: (1) Familiar knowledge of Montana ground water laws and sanitary standards for water well drilling and construction of water wells; (2) knowledge of types of water well construction; (3) knowledge of types of drilling tools and their respective uses; (4) knowledge of underground geology in its relation to well construction; (5) possession of adequate equipment by the applicant to complete satisfactory water wells under the standards to be adopted by the board for such wells; (6) financial responsibility of the applicant by competent proof of the same; (7) successful completion of an examination given by or under direction of the board.

The examinations conducted by the board shall be held at such times and places as the board may determine. Failure of an applicant to successfully complete such examination shall disqualify him from making further application for a period of six (6) months. The board shall act within a reasonable time upon all applications for licenses hereunder. Each application shall be accompanied by the initial fee, as set forth herein, and failure to successfully meet the requirements of the board shall not entitle such applicant to a refund of said fee.

History: En. Sec. 8, Ch. 176, L. 1961.

66-2609. Bond to be required. The board, upon issuance of a license hereunder to any person, shall, before such person commences operations

within the state of Montana, require a good and sufficient surety bond, to be approved by the board, in the penal sum of one thousand dollars (\$1,000.00), conditioned that such licensee will comply with the rules and regulations of the board and all reasonable requirements made by the board in connection with the drilling of any individual well.

History: En. Sec. 9, Ch. 176, L. 1961.

66-2610. Revocation and suspension. Any license issued hereunder may be suspended or revoked by the board, in cases other than failure of a licensee to renew such license, after notice and hearing, in the event the licensee shall have been found to have violated any condition of the bond maintained by him as a prerequisite to issuance of such license, or for the practice of fraud or deceit in obtaining a license, or for gross negligence, incompetence, conviction of a felony, or violating the requirements of this act. Any person may make complaint against any licensee hereunder. Such complaints shall be in writing, signed by the complainant, and must specify the charges against said licensee. The board, on its own motion, may bring on a hearing of charges hereunder.

Upon receipt of a complaint by the board, or upon the board's own motion, the same shall be set for hearing, and the board shall cause the licensee concerned to be given at least ten (10) days' written notice prior to the time set for such hearing, notifying him of the time and place of the hearing and furnishing him with a true and correct copy of the complaint. Service upon such licensee shall be deemed to have been made when said notice and a copy of complaint are deposited by the board in the United States mail, in an envelope securely sealed with the correct amount of postage thereon, addressed to the licensee at the address shown in the records and files of the board for such licensee. At any hearing before the board, any party may appear either in person or by counsel, except that the person bringing the complaint shall have the burden of proof and must appear in person. A unanimous vote of the board shall be required in order to revoke or suspend a license issued hereunder. In the event that a suspension is directed by the board, it shall not be for a period in excess of one (1) year.

History: En. Sec. 10, Ch. 176, L. 1961.

66-2611. Appeals. Appeals from decisions of the board may be taken to the district court of the first judicial district of the state of Montana, in and for the county of Lewis and Clark, in which district the board shall maintain its office in connection with the office of the state engineer, or the district court of any judiciary district in which the land affected is situated, in whole or in part. Appeals from board decisions may be taken immediately to said court without first requesting rehearing, reconsideration, or review of the board, but, in order to perfect such an appeal, it shall be taken within thirty (30) days of the date of the decision of the board. The appeal shall be perfected by the filing of a notice of appeal with the board and a copy of said notice with the clerk of the said district court. The trial shall be had summarily before the district court upon the record of the evidence presented to the board of which a complete

record must be kept of the hearings of the board as shown by said transcript and the exhibits, if any, presented to the board and certified by it, and upon which its decision was rendered, and there shall not be any additional evidence introduced or anything in the nature of a trial de novo. The court shall not substitute its judgment or discretion for that of the board, but shall determine whether the board acted capriciously, arbitrarily, or abused its discretion, and whether it acted according to the law. An appeal may be taken from any final determination of said district court to the supreme court of this state as in other civil cases.

History: En. Sec. 11, Ch. 176, L. 1961.

66-2612. No action or counterclaim to be maintained except by licensee. No action or counterclaim shall be maintained by any contractor in any court in this state with respect to any agreement, work, labor, or materials for which a license is required by this act, or to recover the agreed price or any compensation under any such agreement, or for any such work, labor or materials for which a license is required by this act without alleging and proving that such contractor had a valid license at the time of making such agreement and of supplying such labor, work or materials.

History: En. Sec. 12, Ch. 176, L. 1961.

66-2613. Penalties. Any person who shall willfully violate any lawful regulation, rule or order of the board, or who shall engage in the business of drilling or making water wells without first having obtained a license as in this act required, or who shall violate any provision of this act, shall be guilty of a misdemeanor, and upon conviction shall be subject to a fine of not more than five hundred dollars (\$500.00), or imprisonment in a county jail for a term not exceeding six (6) months, or both. Any violation of this act shall be prosecuted by the county attorney in the county in which the said violation occurred or is occurring, and the trial thereof shall be held in that county.

History: En. Sec. 13, Ch. 176, L. 1961.

66-2614. Repeal clause—construction of act. Any act or part of any act in conflict herewith, in whole or in part, is hereby repealed to the extent of such conflict. If any part of this act should be declared unconstitutional, that shall not affect the validity or constitutionality of the remainder of this act. Specifically, this act neither augments nor conflicts with sections 69-1301 through 69-1341, dealing with public and other water supplies under the jurisdiction of the state board of health of the state of Montana.

History: En. Sec. 14, Ch. 176, L. 1961. Compiler's Note sections referred to above, were repealed by Sec. 15, Ch. 142, Laws 1955 (69-1340).

Sections 69-1321 to 69-1325, the Water Pollution Control Act contained in the

TITLE 67

PROPERTY

General rights of state over property, 67-101 to 67-104. Definitions and nature of property, 67-201 to 67-212. Chapter

- 3. Ownership of property and interests therein, 67-301 to 67-329.
- Conditions and limitations of ownership, 67-401 to 67-424. Real property and estates therein, 67-501 to 67-527.

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CHAPTER 1

GENERAL RIGHTS OF STATE OVER PROPERTY

Section 67-101. Original and ultimate title.

67-102. Property escheats, when.

Acquisition by taxation. 67-103.

67-104. By right of eminent domain.

(27) Original and ultimate title. The original and ultimate right of all property, real and personal, within the jurisdiction of this state, and not belonging to the United States, is in the people of the state.

History: En. Sec. 60, Pol. C. 1895; reen. Sec. 26, Rev. C. 1907; re-en. Sec. 27, R. C. M. 1921. Cal. Pol. C. Sec. 40.

Collateral References

States 21.

81 C.J.S. States § 2.

References

In re Beck's Estate, 44 M 561, 579, 121 P 784; Bottomly v. Meagher County, 114 M 220, 225, 133 P 2d 770.

67-102. (28) **Property escheats, when.** Whenever the title to any property fails for want of heirs or next of kin, it reverts to the state. All property within the limits of this state, which does not belong to any person, belongs to the state.

History: En. Sec. 61, Pol. C. 1895; reen. Sec. 27, Rev. C. 1907; re-en. Sec. 28, R. C. M. 1921. Cal. Pol. C. Sec. 41.

Cross-Reference

Escheat, secs. 91-501 et seq.

References

In re Beck's Estate, 44 M 561, 579, 121 P 784; Bottomly v. Meagher County, 114 M 220, 225, 133 P 2d 770.

Collateral References

Escheat € 1 et seq.

30 C.J.S. Escheat §§ 1, 2 et seq.

19 Am. Jur. pp. 380-416, Escheat, §§ 1-55.

Unclaimed deposits required by public utility, 43 ALR 2d 1276.

Escheat of estate of illegitimate. 48 ALR 2d 778.

Escheat of personal property of intestate domiciled or resident in another state. 50 ALR 2d 1375.

67-103. (29) Acquisition by taxation. The state, or any county thereof, may acquire property by taxation in the modes authorized by law.

History: En. Sec. 62, Pol. C. 1895; reen. Sec. 28, Rev. C. 1907; re-en. Sec. 29, R. C. M. 1921. Cal. Pol. C. Sec. 43.

Collateral References

Taxation € 679. 85 C.J.S. Taxation § 744 et seq.

67-104. (30) By right of eminent domain. The state may acquire or authorize others to acquire title to property, real or personal, for public use, in the cases and in the modes provided in sections 93-9901 to 93-9926.

History: En. Sec. 63, Pol. C. 1895; reen. Sec. 29, Rev. C. 1907; re-en. Sec. 30, R. C. M. 1921. Cal. Pol. C. Sec. 44.

References

State ex rel. McLeod v. District Court, 67 M 164, 168, 215 P 240; State v. Aitchison, 96 M 335, 338, 30 P 2d 805.

Collateral References

Eminent Domain 21. 29 C.J.S. Eminent Domain §§ 1, 2. 18 Am. Jur. 621 et seq., Eminent Domain.

CHAPTER 2

DEFINITIONS AND NATURE OF PROPERTY

Section 67-201. Property, what constitutes.

67-202. In what property may exist.

67-203. Wild animals.

67-204. Property rights in fur-bearing animals.

67-205. Brands—recording—fees.

67-206. Real and personal.

67-207. Real property.

67-208. Land.

67-209. Fixtures.

67-210. Fixtures attached to mines.

67-211. Appurtenances.

67-212. Personal property.

67-201. (6663) **Property, what constitutes.** The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this code, the thing of which there may be ownership is called property.

History: En. Sec. 1070, Civ. C. 1895; re-en. Sec. 4421, Rev. C. 1907; re-en. Sec. 6663, R. C. M. 1921. Cal. Civ. C. Sec. 654. Field Civ. C. Sec. 159.

Operation and Effect

The incumbent of a public office for a definite term carrying a fixed salary has a "property interest" therein within the meaning of this section and section 67-202 and within constitutional provision that no person shall be deprived of property

without due process of law. State ex rel. Ryan v. Norby, 118 M 283, 165 P 2d 302, 304.

References

State v. Bradshaw, 53 M 96, 103, 161 P 710; Gas Products Co. v. Rankin, 63 M 372, 388, 207 P 993; Town of Cascade v. County of Cascade, 75 M 304, 310, 243 P 806; Homestake Exploration Corp. v. Schoregge, 81 M 604, 619, 264 P 388.

Collateral References Property 2, 7.

73 C.J.S. Property §§ 1, 13. Generally, see 42 Am. Jur. 185, Property.

67-202. (6664) In what property may exist. There may be ownership of all inanimate things which are capable of appropriation or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill as the composition of an author, the good will of a business, trade-marks and signs, and of rights created or granted by statute.

History: En. Sec. 1071, Civ. C. 1895; re-en. Sec. 4422, Rev. C. 1907; re-en. Sec. 6664, R. C. M. 1921, Cal. Civ. C. Sec. 655. Field Civ. C. Sec. 160.

Operation and Effect

The incumbent of a public office for a definite term carrying a fixed salary has a "property interest" therein within the meaning of this section and section 67-201

and within constitutional provision that no person shall be deprived of property without due process of law. State ex rel. Ryan v. Norby, 118 M 283, 165 P 2d 302, 304.

Collateral References

Property \$2. 73 C.J.S. Property § 2 et seq.

67-203. (6665) Wild animals. Animals wild by nature are the subjects of ownership, while living, only when on the land of the person claiming them, or when tamed, or taken or held in the possession, or disabled and immediately pursued.

History: En. Sec. 1072, Civ. C. 1895; re-en. Sec. 4423, Rev. C. 1907; re-en. Sec. 6665, R. C. M. 1921. Cal. Civ. C. Sec. 656. Field Civ. C. Sec. 161.

Operation and Effect

Under this section an owner of land has a qualified ownership in wild fowl which were protected, fed and claimed by him thereon, and he alone has the right to hunt them while on his land; hence a trespasser has no right to kill or to take them away. Herrin v. Sutherland, 74 M 587, 601, 241 P 328, 42 ALR 937.

67-204. (6665.1) Property rights in fur-bearing animals. That fur-bearing animals which of their nature, in the absence of efforts for their domestication, are known as wild, whenever the same shall have been brought into or born in restraint or captivity, whether in or upon reserves, preserves, parks, ranches or other premises of lands or waters possessed or operated in whole or part for the preservation, culture, breeding or growing of such animals in a state of whole or partial domestication, and wherein or whereon routine attention is given to such preservation, culture, breeding or growing of such animals, are and shall be, together with their offspring and increase, the subjects of ownership, lien and all kinds of absolute and other property rights (the same as purely domestic animals) in whatever situation, location or condition such animals may thereafter come or be, and regardless of their remaining in or escaping from such restraint or captivity; provided, however, that such escaped animals must bear a registered brand or tattoo, pursuant to the next section, to be subject to private ownership.

History: En. Sec. 1, Ch. 97, L. 1933.

3 C.J.S. Animals §§ 3, 4, 7.

2 Am. Jur. 694, Animals, §§ 8 et seq.

Collateral References

Animals 2.

67-205. (6665.2) Brands—recording—fees. That any owner or prospective owner of such animals in restraint or captivity shall be entitled from

time to time, by written subscribed statement, to adopt distinctive brands or tattoo marks, and not including arabic numerals and not already in known use by others, for any of such animals and to have such distinctive brands and tattoo marks recorded in his name in the office of the secretary of the livestock commission, upon paying a recording fee of four dollars (\$4.00) for each such brand and for each such tattoo marks. Such statements shall be recorded in a suitable book to be kept therefor in said office. The presence of such recorded brand or recorded tattoo marks upon any such animal shall be prima-facie evidence of the ownership of such animal in the person, persons, association or corporation in whose name such brand or tattoo mark is so recorded, subject always to his, their or its right to make due transfer of title, right or interest in, or lien upon such animal.

History: En. Sec. 2, Ch. 97, L. 1933.

3 C.J.S. Animals §§ 24-26, 28, 30, 31, 101,

Collateral References

Animals 5-13.

67-206. (6666) Real and personal. Property is either:

- 1. Real or immovable; or,
- 2. Personal or movable.

History: En. Sec. 1073, Civ. C. 1895; re-en. Sec. 4424, Rev. C. 1907; re-en. Sec. 6666, R. C. M. 1921. Cal. Civ. C. Sec. 657. Field Civ. C. Sec. 162.

Operation and Effect

Growing timber is realty under our law. R. M. Cobban Realty Co. v. Donlan, 51 M 58, 66, 149 P 484.

Crops of wheat and oats are emblements, and as such are treated as chattels personal, subject to sale or mortgage, and levy of attachment or execution, even

while still annexed to the soil. Power Mercantile Co. v. Moore Mercantile Co., 55 M 401, 407, 177 P 406.

References

Montana Electric Co. v. Northern Valley Min. Co., 51 M 266, 271, 153 P 1017; Wheeler v. McIntyre, 55 M 295, 301, 175 P 892; Helena & Livingston Smelting & Refining Co. v. Northern Pacific Ry. Co., 62 M 281, 293, 205 P 224, 21 ALR 1080; Morton v. Union Central Life Ins. Co., 80 M 593, 608, 261 P 278.

67-207. (6667) Real property. Real or immovable property consists of:

- 1. Land:
- 2. That which is affixed to land;
- 3. That which is incidental or appurtenant to land;
- 4. That which is immovable by law.

History: En Sec. 1074, Civ. C. 1895; re-en. Sec. 4425, Rev. C. 1907; re-en. Sec. 6667, R. C. M. 1921. Cal. Civ. C. Sec. 658. Based on Field Civ. C. Sec. 163.

Annual Crops

Annual crops are usually treated as chattels personal, subject to sale or mortgage and levy of execution as other chattels are, even while still annexed to the soil, and are not included within the definition of real property. Morton v. Union Central Life Ins. Co., 80 M 593, 608, 261 P 278.

Annual crops growing upon land are not part of the land under the statutes of this state, but where the owner of the land sells it with the right of immediate possession in the purchaser and without reserving the crops thereon and the purchaser takes possession before severance, title passes to the crops as well, and this principle is applicable where the land is sold at decretal or execution sale. Kester v. Amon, 81 M 1, 9, 261 P 288.

Bridges

Where a person enters upon an existing public highway and voluntarily erects a bridge, intending that it should be a part of the same and belong to the public, it becomes of necessity affixed to the land and is real property. State ex rel. Donlan v. Board of Commrs., 49 M 517, 523, 143 P 984.

Buildings

In the absence of anything to show an intention to the contrary, things affixed to the realty, such as buildings permanently resting upon foundations embedded in the soil, are part of the realty and pass with it; hence ownership of such a structure necessarily followed ownership of the land rightfully decreed to plaintiff. Hauf v. School District, 52 M 395, 397, 158 P 315.

Easements

An easement for a right of way for cutting and hauling timber is realty under our law. R. M. Cobban Realty Co. v. Donlan, 51 M 58, 66, 149 P 484.

A right of way, and the right to a

ditch, canal or other structure in which water is conveyed for irrigation or other lawful purposes, are easements over the land occupied by the ditch, canal, etc. An "easement" is an appurtenance to land, and constitutes an interest in real property. Mannix v. Powell County, 60 M 510, 513, 199 P 914. See also Rodda v. Best, 68 M 205, 215, 217 P 669.

Growing Grass

Growing grass is a part of the soil of which it is the natural growth, within the meaning of this section and section 67-209, and destruction thereof by the herding of livestock thereon constitutes a damage to the owner's real property. Kiehl v. Holliday, 77 M 451, 455, 251 P

Growing Timber

Growing timber is realty under our law. R. M. Cobban Realty Co. v. Donlan, 51 M 58, 66, 149 P 484.

Mining Machinery

Mining machinery, being deemed affixed to the mine, is real property. Brit-

annia Min. Co. v. United States F. & G. Co., 43 M 93, 99, 115 P 46.

Oil and Gas

So long as petroleum and gas remain in the ground they are part of the realty and as such subject to the owner's control. Williard v. Federal Surety Co., 91 M 465, 471, 8 P 2d 633.

Shares of Stock in Mutual Irrigation Company

While shares of stock in a mutual irrigation company, organized for the convenience of its members in the distribution to them of water for use upon their lands in proportion to their respective interest, are personal property for the purpose of transfer, they, representing water rights, are appurtenant to the lands held by their owners and, unless reserved, pass with the conveyance of the lands though not mentioned therein. Yellow-stone V. Co. v. Associated Mtg. Investors, 88 M 73, 82, 290 P 255, 70 ALR 1002.

References

Montana Electric Co. v. Northern Valley Min. Co., 51 M 266, 271, 153 P 1017; Wheeler v. McIntyre, 55 M 295, 301, 175 P 892; Helena & Livingston Smelting & Refining Co. v. Northern Pacific Ry. Co., 62 M 281, 292, 205 P 224, 21 ALR 1080; Shipler v. Potomac Copper Co., 69 M 86, 95, 220 P 1097; Story Gold Dredging Co. v. Wilson, 106 M 166, 173, 174, 76 P 2d 73; Foreman v. Beaverhead County, 117 M 557, 561, 161 P 2d 524; Clark v. Clark, 126 M 9, 242 P 2d 992, 993; Yellowstone Pipe Line Co. v. State Board of Equalization, — M —, 358 P 2d 55, 68.

Collateral References

Fixtures 1 et seq.; Property 4. 36A C.J.S. Fixtures §§ 1, 3, 4, 7, 23, 24; 73 C.J.S. Property § 7. 42 Am. Jur. 195, Property, §§ 13-22.

67-208. (6668) Land. Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance.

History: En. Sec. 1075, Civ. C. 1895; re-en. Sec. 4426, Rev. C. 1907; re-en. Sec. 6668, R. C. M. 1921. Cal. Civ. C. Sec. 659. Field Civ. C. Sec. 164.

References

State ex rel. Northern Pacific Ry. Co. v. Duncan, 68 M 420, 425, 219 P 638; Mor-

ton v. Union Central Life Ins. Co., 80 M 593, 608, 261 P 278; Clark v. Clark, 126 M 9, 242 P 2d 992, 993.

Collateral References

Property \$\sim 4.\$ 73 C.J.S. Property § 7 et seq.

67-209. (6669) Fixtures. A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent as by means of cement, plaster, nails, bolts, or screws.

History: En. Sec. 1076, Civ. C. 1895; re-en. Sec. 4427, Rev. C. 1907; re-en. Sec. 6669, R. C. M. 1921. Cal. Civ. C. Sec. 660. Field Civ. C. Sec. 165.

Application in General

This section specifying when a thing is deemed to be affixed to land is merely a rule for general guidance concerning itself more with ultimate than with probative facts. Pritchard Petroleum Co. v. Farmers Co-op. Co., 117 M 467, 474, 161 P 2d 526.

Attachment to Realty in General

An attachment made in the manner indicated in this section and section 67-210 raises a presumption that the one who made the attachment intended the thing affixed to become a part of the realty, and, as a general rule, the manner in which the attachment is made, the adaptability of the thing attached to the use to which the realty is applied, and the intention of the one making the attachment, determine whether the thing attached is realty or personalty. The relation of the parties to the property may affect the application of the rule. Montana Electric Co. v. Northern Valley Min. Co., 51 M 266, 272, 273, 153 P 1017. See Padden v. Murgittroyd, 54 M 1, 6, 165 P 913.

Bridge

A bridge is of necessity affixed to the realty and is real estate. State ex rel. Donlan v. Board of Commrs., 49 M 517, 523, 143 P 984.

Building

A building erected upon land belongs to the owner of the land, and the burden of proof is upon him who claims that it is personal property to show that it is, the presumption to the same effect declared by this section, being a disputable one which may be overcome by evidence that the building was constructed in such a manner or under such circumstances as to preclude the idea that it was intended to become a part of the realty. Shipler v. Potomac Copper Co., 69 M 86, 95, 220 P 1097.

In the absence of evidence rebutting the presumption that the school building and the fence about the site became a part of the school site, and in view of the clause in the deed to the district that the property should revert to the grantor on abandonment of the site "together with all tenements, hereditaments and appurtenances thereunto belonging," held that the building and fence necessarily passed to defendant on reversion to him. School Dist. No. 42 v. Pribyl, 82 M 295, 301, 267 P 289.

Casing in Oil Well

Casing in an oil well, like engines, buildings and machinery and appliances placed upon land by a lessee for operating the premises for oil and gas purposes, are trade fixtures and become part of the land and the leasehold. Callender v. Crossfield Oil Syndicate, 84 M 263, 272, 275 P 273, overruled on another point in 113 M 392, 397, 130 P 2d 685, 132 P 2d 160.

Cover for Stovepipe Flue

A cover for a stovepipe flue, opening into the chimney from the interior of a building, and removable when such flue was to be used, was not material entering into the construction of the building, nor a fixture, and such building was not subject to a lien therefor. Missoula Mercantile Co. v. O'Donnell, 24 M 65, 71, 60 P 594, 991.

Crops

This section, so far as it refers to roots, vines, and shrubs, is intended to include the things produced essentially by the powers of nature only, namely, fructus naturales, as distinguished from fructus industriales. Power Mercantile Co. v. Moore Mercantile Co., 55 M 401, 408, 177 P 406.

Annual crops are usually treated as chattels personal, subject to sale or mortgage and levy of execution as other chattels are, even while still annexed to the soil, and are not included within the definition of real property. Morton v. Union Central Life Ins. Co., 80 M 593, 608, 261 P 278.

Electrical Equipment

Machines, motors and other electrical equipment placed upon movable platform were not fixtures so as to make them real estate and subject to mechanic's lien. Cascade Electric Co. v. Associated Creditors, Inc., 124 M 370, 224 P 2d 146, 150.

Fences

A fence is a fixture and its annexation to land is governed by the law of fixtures. Schmuck v. Beck, 72 M 606, 615, 234 P 477.

Where one places a fence on the land of another without an agreement permitting him to do so, it belongs to the owner of the land unless he chooses to require him to remove it, the presumption, disputable in nature, being that one in possession of land is also the owner of the fixtures thereon. Schmuck v. Beck, 72 M 606, 615, 234 P 477.

Growing Grass

Growing grass is a part of the soil of which it is the natural growth, within the meaning of section 67-207, and this section, and destruction thereof by the herding of livestock thereon constitutes a damage to the owner's real property. Kiehl v. Holliday, 77 M 451, 455, 251 P

Growing Timber

Growing timber is realty under our law. R. M. Cobban Realty Co. v. Donlan, 51 M 58, 66, 149 P 484.

Machinery

Where the owner of a mining claim, before selling it, explained to the buyer that an electric hoist which, though placed upon a substantial foundation on the claim, could be removed without material injury to either claim or hoist, and had been used in mining operations under a lease at a fixed rental per month, to be returned to the owner at the expiration of the term of hiring, did not belong to him, but had been installed at the in-stance of a company which had been working the claim under an option to purchase, and that he was merely holding it as security for money due him from such company, the buyer was not a bona fide purchaser, but one with notice, and therefore not entitled to claim the machinery as a fixture. Montana Electric Co. v. Northern Valley Min. Co., 51 M 266, 273, 153 P 1017.

Presumptions as to Intent

While the question of whether personal property has become affixed to the land is one concerning the intention of the affixer yet it is presumed that when the property is affixed it is intended to become part of the realty and generally the manner in which the attachment is made, the adaptability of the thing attached to the use to which the realty is applied, together with the intention of the one making the attachment, determines whether the thing attached is realty or personalty. Pritchard Petroleum Co. v. Farmers Co-op. Co., 117 M 467, 474, 161 P 2d 526.

When Chattels Affixed to Land Do Not Become Fixtures

Whether a thing imbedded in the soil is or is not a fixture depends upon the intention of the party making the annexa-tion and the use or purpose of annexation; to become a fixture the intention to make an article a permanent accession to the realty must affirmatively and plainly appear, if left in doubt it must be deemed a chattel; if attached for a use which does not enhance the value of the land it does not become a fixture. Butte Electric Ry. Co. v. Brett, 80 M 12, 17, 257 P 478.

References

Hauf v. School District, 52 M 395, 397, 158 P 315; Wheeler v. McIntyre, 55 M 295, 301, 175 P 892; Helena & Livingston Smelting & Refining Co. v. Northern Pacific Ry. Co., 62 M 281, 292, 205 P 224, 21 ALR 1080; Arnold v. Genzberger, 96 M 358, 391, 31 P 2d 296; Story Gold Dredging Co. v. Wilson, 106 M 166, 174, 76 P 2d 73; Yellowstone Pipe Line Co. v. State Board of Equalization, — M —, 358 P 2d 55, 68.

Collateral References

22 Am. Jur. 711, Fixtures.

Sprinkler system as fixture. 19 ALR 2d 1300.

Amusement apparatus or device as fix-

ture. 41 ALR 2d 664.
Air conditioning plant, equipment, apparatus, or the like as fixture. 43 ALR 2d 1378.

Appliances, accessories, pipes, or other articles connected with plumbing, as fixtures. 52 ALR 2d 222.

Carpets, linoleum, or the like as fixtures. 55 ALR 2d 1044.

Electric range as fixture. 57 ALR 2d

Law Review

Montana Law and the Uniform Commercial Code, 21 Mont. L. Rev. 1, 102 (Fall 1959).

67-210. (6670) Fixtures attached to mines. Sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine.

History: En. Sec. 1077, Civ. C. 1895; re-en. Sec. 4428, Rev. C. 1907; re-en. Sec. 6670, R. C. M. 1921. Cal. Civ. C. Sec. 661.

Dredge Deemed Fixture in Absence of

A dredge used in placer mining operations is mining machinery within the meaning of this section, and deemed affixed to the mine, in the absence of an express agreement that it may be removed. When

on mining property and used for working and developing the mine, in applying this section the disputable presumption arises that the dredge became a part of the real property. This presumption is overcome where personal property is affixed to the land under express agreement that it may be removed as between the parties and those having notice of such agreement. Story Gold Dredging Co. v. Wilson, 106 M 166, 174, 76 P 2d 73.

$\begin{array}{cccc} \textbf{Intention---Drawn} & \textbf{by Deductions---Presumption} \end{array}$

Whether machinery used in operation of a mine is realty or personalty is not determined by the secret intention of the person making the annexation, but the intention deducible as a presumption of law from the character of the chattel, the manner and effect of its annexation, its adaptability to the use of the realty, the purpose to which it is put, the relation of the parties, and the policy of the law. Story Gold Dredging Co. v. Wilson, 106 M 166, 174, 76 P 2d 73.

Mining Equipment

Mining machinery, being deemed affixed to the mine, is real property. Britannia Min. Co. v. United States F. & G. Co., 43 M 93, 99, 115 P 46.

By virtue of this section mining tools and machinery are deemed affixed to the mine and therefore constitute "machinery or fixtures for" mining claims within the meaning of section 45-501 entitling one who furnished the same or performs labor thereon, to a lien. Purchase price of such tools and machinery and labor charges for repairing the same are lienable items. Caird Engineering Works v. Seven-Up Gold Mining Co., Inc., 111 M 471, 489, 111 P 2d 267.

Oil Well Casing

It is contended by plaintiff that the casing must be deemed to have been affixed to the realty, by virtue of the provisions of this section. With this contention we do not agree. Our code section was taken from California. It has been construed by the courts of that state, and the construction is not in accord with such construction. The California court recognized the rule that chattels may be annexed to real estate and still retain their character as personal property. Where casing used in sinking an oil well was fur-

nished to the owner of the leasehold by a third person under a contract that ownership of the easing should remain in such person unless oil or gas in commercial quantities be encountered and the operations resulted in a dry hole, the casing retained its character as personal property and did not become affixed to the land, and therefore the lien of the driller did not extend to it. Cheadle v. Bardwell, 95 M 299, 312, 26 P 2d 336.

When This Section Controlling

This section is controlling where the question is whether a dredge used in placer mining operations was a fixture, over section 67-1307, relating to fixtures as applied to all classes and kind of tenancies, under the rule that a statute dealing with a part of a subject in a more definite and minute way will prevail over one dealing with the subject in general and comprehensive terms, to the extent of any necessary repugnance between them. Story Gold Dredging Co. v. Wilson, 106 M 166, 175, 76 P 2d 73.

References

Montana Electric Co. v. Northern Valley Min. Co., 51 M 266, 271, 153 P 1017; Pioneer Min. Co. v. Bannack Gold Min. Co., 60 M 254, 265, 198 P 748; Helena & Livingston Smelting & Refining Co. v. Northern Pacific Ry. Co., 62 M 281, 292, 205 P 224, 21 ALR 1080; Shipler v. Potomac Copper Co., 69 M 86, 220 P 1097; Callender v. Crossfield Oil Syndicate, 84 M 263, 272, 275 P 273; Yellowstone V. Co. v. Associated Mtg. Investors, 88 M 73, 82, 290 P 255, 70 ALR 1002; Story Gold Dredging Co. v. Wilson, 106 M 166, 174, 76 P 2d 73; Yellowstone Pipe Line Co. v. State Board of Equalization, — M —, 358 P 2d 55, 68.

Collateral References

Fixtures \$5-27. 36A C.J.S. Fixtures § 4 et seq.

67-211. (6671) Appurtenances. A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another.

History: En. Sec. 1078, Civ. C. 1895; re-en. Sec. 4429, Rev. C. 1907; re-en. Sec. 6671, R. C. M. 1921, Cal. Civ. C. Sec. 662. Field Civ. C. Sec. 166.

Annual Crops

This section does not, strictly speaking, embrace things such as annual crops produced by industry, for they are not used with the land for its benefit, the section dealing with rights of way and the like, which are servitudes upon other land and easements attached to the land bene-

fited. Power Mercantile Co. v. Moore Mercantile Co., 55 M 401, 408, 177 P 406.

Rights of Stockholders of Nonprofit Irrigation Company as Appurtenances

The rights of stockholders in a nonprofit irrigation company, i.e., to use the storage and distribution facilities of the corporation and to receive a pro rata share of the water, are rights which, when used on certain lands, become appurtenant thereto under this section. Brady Irrigation Co. v. Teton County, 107 M 330, 333, 85 P 2d 350.

Shares of reservoir company's stock each of which entitled owner to 1/1000 part of distributable water of the corporation were but an indicia of the contract for the percentage of the water which owners had a right to receive, which right might become "appurtenant" to the land served by the water, but the water, or the facilities used to transport the water were not "appurtenant" to land within this section defining appurtenances. Ackroyd v. Winston Bros. Co., 113 F 2d 657, 661.

Tacit Grant

Under the common law as well as the codes (this section, 67-1522 and 67-1523), whoever grants a thing tacitly grants that without which the grant would be of no avail—the principal thing carries with it the incident. Yellowstone V. Co. v. Associated Mtg. Investors, 88 M 73, 80, 290 P 255, 70 ALR 1002.

Water Right

A water right acquired and used for a beneficial and necessary purpose in connection with realty is an appurtenance thereto, and, as such, passes with a conveyance of the land, unless expressly reserved from the grant. Tucker v. Jones, 8 M 225, 232, 19 P 571; Sweetland v. Olsen, 11 M 27, 29, 27 P 339; Beatty v. Murray Placer Mining Co., 15 M 314, 316, 39 P 82; Sloan v. Glancy, 19 M 70, 76, 47 P 334; Carman v. Staudaker, 20 M 364, 366, 51 P 738; Smith v. Denniff, 23 M 65, 68, 57 P 557; Smith v. Denniff, 24 M 20, 25, 60 P 398.

Where a water right was not granted for any certain purpose or for use on any particular land, it did not become an appurtenance by the terms of the deed, and could not thereafter be conveyed as an appurtenance unless the grantee had given it that character by using it with and for the benefit of, the land. Tucker v. Jones, 8 M 225, 231, 19 P 571; Sweetland v. Olsen, 11 M 27, 29, 27 P 339; Custer Con. Mines Co. v. City of Helena, 52 M 35, 43, 156 P 1090.

A watercourse from or across the land of another is an easement, and an appurtenance to land is in any and every case an easement. Smith v. Denniff, 24 M 20, 23, 60 P 398.

This section may not be interpreted to mean that a water right acquired by prior appropriation by one who has only possessory title to the land, although with the intent at the time to use the water upon such land, shall, by the mere act of using it as intended, become inseparably attached as an appurtenance, and the appropriator thereby loses his water right. Such an interpretation would not only violate recognized custom and legal principles, but would render inoperative the provisions of section 89-803. Smith v. Denniff, 24 M 20, 23, 60 P 398.

References

Pioneer Min. Co. v. Bannack Gold Min. Co., 60 M 254, 265, 198 P 748; Rodda v. Best, 68 M 205, 215, 217 P 669; Morton v. Union Central Life Ins. Co., 80 M 593, 608, 261 P 278; Moccasin State Bank v. Waldron, 81 M 579, 586, 264 P 940; Yegen v. Cardwell, 133 M 236, 321 P 2d 1077, 1079.

Collateral References

Easements 3. 28 C.J.S. Easements § 1 et seq.

67-212. (6672) Personal property. real is personal.

History: En. Sec. 1079, Civ. C. 1895; re-en. Sec. 4430, Rev. C. 1907; re-en. Sec. 6672, R. C. M. 1921. Cal. Civ. C. Sec. 663. Field Civ. C. Sec. 167.

Retail Liquor License

A retail liquor license is salable and is personal property of value and subject

Every kind of property that is not

to attachment. Stallinger v. Goss, 121 M 437, 193 P 2d 810.

Collateral References

Property € 4.
73 C.J.S. Property § 8.
42 Am. Jur. 204, Property, § 8 23-27.

CHAPTER 3

OWNERSHIP OF PROPERTY AND INTERESTS THEREIN

Section 67-301. Owner.

67-302. Property of the state.

67-303. Ownership-absolute or qualified.

67-304. When absolute. 67-305. When qualified.

67-306. Several or sole ownership, what designated as.

67-307. Ownership of several persons.

67-308. Joint interest defined.

67-309. Right of two or more persons to use a safety deposit box creates joint tenancy, when,

67-310. Right of survivorship in certain conveyances recognized.

67-311. Partnership interest defined. 67-312. Interest in common defined.

67-313. What interests are in common.

67-314. Interest as to time.

67-315. Present interest—to what entitles owner. 67-316. Future interest—to what entitles owner.

67-317. Perpetual interest, duration of. 67-318. Limited interest, duration of.

67-319. Kinds of future interests.

67-320. Vested interests.

67-321. Contingent interests. 67-322. Two or more future in

67-322. Two or more future interests.

67-323. Certain future interests not to be void.

67-324. Posthumous children.

67-325. Qualities of expectant estates.

67-326. Same—mere possibility not an interest.

67-327. Interests in real property.

67-328. Same—names and classification of interests.

67-329. What future interests are recognized.

67-301. (6673) **Owner.** All property has an owner, whether that owner is the state, and the property public; or the owner an individual, and the property private. The state may also hold property as a private proprietor.

History: En. Sec. 1090, Civ. C. 1895; re-en. Sec. 4431, Rev. C. 1907; re-en. Sec. 6673, R. C. M. 1921, Cal. Civ. C. Sec. 669. Field Civ. C. Sec. 168.

Cross-Reference

Deposit of property, secs. 20-101 to 20-501.

Collateral References

Property 7. 73 C.J.S. Property § 13.

67-302. (6674) Property of the state. The state is the owner of all land below the water of a navigable lake or stream; of all property lawfully appropriated by it to its own use; of all property dedicated or granted to the state, and all property of which there is no other owner.

History: En. Sec. 1091, Civ. C. 1895; re-en. Sec. 4432, Rev. C. 1907; re-en. Sec. 6674, R. C. M. 1921. Cal. Civ. C. Sec. 670. Based on Field Civ. C. Sec. 169.

Abandoned Bed of Missouri River Which Changed Its Channel, Belongs to State

When the Missouri River changed its channel when the ice broke up in the spring, by cutting across an ox-bow loop, the abandoned bed occupied by the river at the time of the avulsion, extending to the ordinary low-water mark, belonged to the state of Montana, since under this section the state became the owner of the bed of the river, subject to the rights of the government in respect to navigation, upon its admission to the union, and since the Missouri is a navigable stream, the riparian owner, under section 67-712, owns land to the low-water mark. United States v. Eldredge, 33 F Supp 337, 339.

Operation and Effect

The state is the owner of all land below the water of a navigable stream, and therefore the waters above the bed or channel of such a stream at low-water mark are public waters in which the people have a right to fish, except as restrained by general law, and may shoot wild fowl upon the surface of the stream or flying thereover so long as they do not trespass upon the land of an adjacent owner. Herrin v. Sutherland, 74 M 587, 595, 241 P 328, 42 ALR 937.

Collateral References

Dedication 52-54; Navigable Waters 36(1); States 55.

26 C.J.S. Dedication § 49 et seq.; 65 C.J.S. Navigable Waters § 89 et seq.; 81 C.J.S. States § 104.

67-303. (6675) Ownership—absolute or qualified. The ownership of property is either:

- 1. Absolute; or,
- 2. Qualified.

History: En. Sec. 1100, Civ. C. 1895; re-en. Sec. 4433, Rev. C. 1907; re-en. Sec. 6675, R. C. M. 1921. Cal. Civ. C. Sec. 678. Field Civ. C. Sec. 171.

Collateral References

Estates©=3-7.

31 C.J.S. Estates §§ 2, 4, 5, 7-12, 132. 42 Am. Jur. 213, Property, §§ 36-49.

67-304. (6676) When absolute. The ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws.

History: En. Sec. 1101, Civ. C. 1895; 6676, R. C. M. 1921. Cal. Civ. C. Sec. 679. re-en. Sec. 4434, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 172.

67-305. (6677) When qualified. The ownership of property is qualified:

- 1. When it is shared with one or more persons;
- 2. When the time of enjoyment is deferred or limited;
- 3. When the use is restricted.

History: En. Sec. 1102, Civ. C. 1895; 6677, R. C. M. 1921. Cal. Civ. C. Sec. 680. re-en. Sec. 4435, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 173.

67-306. (6678) Several or sole ownership, what designated as. The ownership of property by a single person is designated as a sole or several ownership.

History: En. Sec. 1103, Civ. C. 1895; re-en. Sec. 4436, Rev. C. 1907; re-en. Sec. 6678, R. C. M. 1921. Cal. Civ. C. Sec. 681. Field Civ. C. Sec. 174.

Collateral References

Property 7. 73 C.J.S. Property § 13.

67-307. (6679) **Ownership of several persons.** The ownership of property by several persons is either:

- 1. Of joint interests:
- 2. Of partnership interests;
- 3. Of interests in common.

History: En. Sec. 1104, Civ. C. 1895; re-en. Sec. 4437, Rev. C. 1907; re-en. Sec. 6679, R. C. M. 1921. Cal. Civ. C. Sec. 682. Field Civ. C. Sec. 175.

Cross-References

Husband and wife, property rights, secs. 36-101 to 36-131.

Partition, sec. 93-6301.

Joint Tenancy and Right of Survivorship

A conveyance to persons in joint tenancy carries with it the common-law right of survivorship since the legislature did not abrogate the common-law right of sur-

vivorship as an incidence of joint tenancy. Hennigh v. Hennigh, 131 M 372, 309 P 2d 1022, 1024.

References

Ivins v. Hardy, 120 M 35, 179 P 2d 745, 749; In re Marsh's Estate, 125 M 239, 234 P 2d 459, 462.

Collateral References

Joint Tenancy 27; Partnership 27, 67; Tenancy in Common 21.

48 C.J.S. Joint Tenancy § 1; 68 C.J.S. Partnership §§ 14, 69; 86 C.J.S. Tenancy in Common § 4 et seq.

67-308. (6680) Joint interest defined. A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants.

History: En. Sec. 1105, Civ. C. 1895; re-en. Sec. 4438, Rev. C. 1907; re-en. Sec. 6680, R. C. M. 1921. Cal. Civ. C. Sec. 683. Based on Field Civ. C. Sec. 176.

Cross-References

Actions between joint tenants, secs. 93-2823, 93-2829.

Dower, secs. 22-101 to 22-117.

Husband and wife may be joint tenants sec. 36-108.

Right of one or more joint tenants to

use or develop property, sec. 93-2829. Waste, action against joint tenant, sec.

Joint Tenancy and Right of Survivorship

A conveyance to persons in joint tenancy carries with it the common-law right of survivorship since the legislature did not abrogate the common-law right of sur-

vivorship as an incidence of joint tenancy. Hennigh v. Hennigh, 131 M 372, 309 P 2d 1022, 1024.

References

Hand v. Heslet, 81 M 68, 76, 261 P 609; State Board of Equalization v. Cole, 122 M 9, 195 P 2d 989, 993; State ex rel. Mc-Vay v. District Court, 126 M 382, 251 P 2d 840, 845.

Collateral References

14 Am. Jur. 79, Cotenancy, §§ 6-14.

Retrospective operation of legislation affecting estates by the entireties. 27 ALR 2d 868.

Character of tenancy created by owner's conveyance to himself and another, or to another alone, of an undivided interest. 44 ALR 2d 595.

Right of two or more persons to use a safety deposit box creates joint tenancy, when. When so specified in the agreement granting for a term of time the right in two or more persons to use or occupy any safe or box, commonly referred to as a safe deposit vault or box for the safekeeping of valuables, such interest and estate created in the grantees shall be a joint tenancy in such vault or box and pass to the survivors and survivor upon the death of one or more of the joint tenants with right in such survivors and survivor to have access to and possession of such vault or box and the contents thereof under the terms of the agreement.

History: En. Sec. 1, Ch. 62, L. 1939.

Cross-Reference

Joint bank deposits paid to survivor, sec. 5-528.

Collateral References

Joint Tenancy 3. 48 C.J.S. Joint Tenancy § 3.

Survivor's right to contents of safe deposit box leased or used jointly with another, 14 ALR 2d 948.

67-310. Right of survivorship in certain conveyances recognized. In all conveyances of real property made in joint tenancy or to tenants in estates by entirety, where the right of survivorship is contained in the grant of such conveyance, the right of survivorship is hereby expressly declared to exist by virtue of such grant.

History: En. Sec. 1, Ch. 118, L. 1943.

The effect of this enactment was to provide that the right of survivorship exists in those classes of conveyances covered by it, whether made to joint tenants or to tenants in estates by entirety, but does not purport to exclude the right of survivorship in other types of conveyances. Hennigh v. Hennigh, 131 M 372, 309 P 2d 1022, 1024.

Right of Survivorship in Joint Tenancy

A conveyance to persons in joint tenancy carries with it the right of survivorship since none of the legislative enact-

ments abrogated the common-law right of survivorship as in incidence of joint tenancy. Hennigh v. Hennigh, 131 M 372, 309 P 2d 1022, 1024.

Collateral References

Construction of devise to persons as joint tenants and expressly to the survivor of them, or to them "with the right of survivorship." 69 ALR 2d 1058.

Law Review

Real property—co-tenancies—creation of joint tenancies [Hennigh v. Hennigh, 131 M 372, 309 P 2d 1022], 19 Mont. L. Rev. 69 (Fall 1957).

67-311. (6681) Partnership interest defined. A partnership interest is one owned by several persons, in partnership, for partnership purposes.

History: En. Sec. 1106, Civ. C. 1895; re-en. Sec. 4439, Rev. C. 1907; re-en. Sec. 6681, R. C. M. 1921, Cal. Civ. C. Sec. 684. Field Civ. C. Sec. 177.

Partnership Property

Although parties individually acquired property by deed from corporation without any mention that it was partnership property it will be considered partnership property where the partnership agreement clearly shows that it was intended to be partnership property. In re Perry's Estate, 121 M 280, 192 P 2d 532, 536.

Collateral References

Generally, see 40 Am. Jur. 113, Partnership.

67-312. (6682) **Interest in common defined.** An interest in common is one owned by several persons, not in joint ownership or partnership.

History: En. Sec. 1107, Civ. C. 1895; re-en. Sec. 4440, Rev. C. 1907; re-en. Sec. 6682, R. C. M. 1921. Cal. Civ. C. Sec. 685. Field Civ. C. Sec. 178.

Cross-References

Actions between tenants in common, secs. 93-2823, 93-2829.

Waste, action against tenant in common, sec. 93-6102.

Irrigation Ditch

Where plaintiff in an action to enjoin another from using an irrigation ditch owned only an undivided interest therein, defendant over whose land it ran owning the remaining interest, they were tenants in common entitling each to use it, each being bound to exercise his right so as not to interfere with the right of the other. Rodda v. Best, 68 M 205, 218, 217 P 669. See also Isom v. Larson, 78 M 395, 399, 255 P 1049.

Mineral Rights

Where the decree in an action to quiet title in effect declared defendant (appellant) a tenant in common with plaintiff

under an assignment of a certain per cent of the minerals in the land, but failed to adjudge in him a right of ingress and egress for the purpose of exploration, his right in that respect will be implied in the decree, since necessary implication is as much a part of an instrument as if that which is so implied were plainly expressed. Hochsprung v. Stevenson, 82 M 222, 237, 266 P 406.

Tenancy in Common

A "tenancy in common" is created whenever the instrument bringing an estate in two or more persons into existence does not specifically state that the estate created is other than a tenancy in common. Ivins v. Hardy, 120 M 35, 179 P 2d 745, 748.

References

Hodgkiss v. Northland Petroleum Consolidated, 104 M 328, 350, 67 P 2d 811; Rosen v. Rozan, 179 F Supp 829, 831.

Collateral References

Tenancy in Common 5.1. 86 C.J.S. Tenancy in Common § 4 et seq.

67-313. (6683) What interests are in common. Every interest created in favor of several persons in their own right, including husband and wife, is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in section 67-308.

History: En. Sec. 1108, Civ. C. 1895; re-en. Sec. 4441, Rev. C. 1907; re-en. Sec. 6683, R. C. M. 1921. Cal. Civ. C. Sec. 686. Based on Field Civ. C. Sec. 179.

Cross-References

Dower, secs. 22-101 to 22-117. Husband and wife may hold property in common, sec. 36-108.

Joint Tenancy and Right to Survivorship

By this section the legislature recognized the difference between joint inter-

ests and interests in common and left people free to contract in either manner. A joint tenancy is a joint interest and the legislature did not abrogate the commonlaw right of survivorship incident to a joint tenancy. Hennigh v. Hennigh, 131 M 372, 309 P 2d 1022, 1024.

Tenants in Common

Where, in an action to quiet title, husband and wife were agreed to have been "the owners" at the time they executed a deed, they were, under this section, tenants in common, each owning an undivided

one-half interest therein. Isom v. Larson,

78 M 395, 399, 255 P 1049.

Where there was no indication in contract of purchase of ranch property that purchasers were buying as copartners, their relationship, so far as ownership of realty was concerned, became prima facie that of "tenants in common" rather than that of "partnership." Ivins v. Hardy, 120 M 35, 179 P 2d 745, 748.

References

Hand v. Heslet, 81 M 68, 76, 261 P 609; Hochsprung v. Stevenson, 82 M 222, 237,

67-314. (6684) Interest as to time. In respect to the time of enjoyment, an interest in property is either:

- 1. Present or future; and,
- Perpetual or limited.

History: En. Sec. 1109, Civ. C. 1895; re-en. Sec. 4442, Rev. C. 1907; re-en. Sec. 6684, R. C. M. 1921. Cal. Civ. C. Sec. 688. Field Civ. C. Sec. 180.

266 P 406; Marias River Syndicate v. Big West Oil Co., 98 M 254, 38 P 2d 599; In re Marsh's Estate, 125 M 239, 234 P 2d 459,

462; Rosen v. Rozan, 179 F Supp 829, 831.

Husband and Wife 14(4-7); Tenancy

41 C.J.S. Husband and Wife §§ 32, 33; 86 C.J.S. Tenancy in Common § 4 et seq. 14 Am. Jur. 87, Cotenancy, §§ 15-22.

Collateral References

Collateral References

in Common € 1. 3.

Estates 21.

31 C.J.S. Estates §§ 1, 2, 5, 14, 15, 17, 18, 132,

67-315. (6685) Present interest—to what entitles owner. A present interest entitles the owner to the immediate possession of the property.

History: En. Sec. 1110, Civ. C. 1895; re-en. Sec. 4443, Rev. C. 1907; re-en. Sec. 6685, R. C. M. 1921. Cal. Civ. C. Sec. 689. Field Civ. C. Sec. 181.

References

In re Estate of Schuh, 66 M 50, 58, 212 P 516.

Collateral References

Property \$\sim 7, 10. 73 C.J.S. Property §§ 13, 14.

67-316. (6686) Future interest—to what entitles owner. A future interest entitles the owner to the possession of the property only at a future period.

History: En. Sec. 1111, Civ. C. 1895; re-en. Sec. 4444, Rev. C. 1907; re-en. Sec. 6686, R. C. M. 1921. Cal. Civ. C. Sec. 690. Field Civ. C. Sec. 182.

Collateral References

19 Am. Jur. 457, Estates; 33 Am. Jur. 445, Life Estate, Remainders, and Reversions.

In re Estate of Schuh, 66 M 50, 58, 212 P 516.

67-317. (6687) Perpetual interest, duration of. A perpetual interest has a duration equal to that of the property.

History: En. Sec. 1112, Civ. C. 1895; re-en. Sec. 4445, Rev. C. 1907; re-en. Sec. 6687, R. C. M. 1921. Cal. Civ. C. Sec. 691. Field Civ. C. Sec. 183.

(6688) Limited interest, duration of. A limited interest has a duration of less than that of the property.

History: En. Sec. 1113, Civ. C. 1895; 6688, R. C. M. 1921. Cal. Civ. C. Sec. 692. re-en. Sec. 4446, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 184.

67-319. (6689) Kinds of future interests. A future interest is either:

- Vested; or,
- Contingent.

History: En. Sec. 1114, Civ. C. 1895; 6689, R. C. M. 1921. Cal. Civ. C. Sec. 693. re-en. Sec. 4447, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 185.

67-320. (6690) Vested interests. A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest.

History: En. Sec. 1115, Civ. C. 1895; 6690, R. C. M. 1921. Cal. Civ. C. Sec. 694. re-en. Sec. 4448, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 186.

67-321. (6691) Contingent interests. A future interest is contingent whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain.

History: En. Sec. 1116, Civ. C. 1895; 6691, R. C. M. 1921. Cal. Civ. C. Sec. 695. re-en. Sec. 4449, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 187.

(6692) Two or more future interests. Two or more future interests may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it, and take effect accordingly.

History: En. Sec. 1117, Civ. C. 1895; 6692, R. C. M. 1921. Cal. Civ. C. Sec. 696. re-en. Sec. 4450, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 188.

67-323. (6693) Certain future interests not to be void. A future interest is not void merely because of the improbability of the contingency on which it is limited to take effect.

History: En. Sec. 1118, Civ. C. 1895; 6693, R. C. M. 1921. Cal. Civ. C. Sec. 697. re-en. Sec. 4451, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 189.

(6694) **Posthumous children.** When a future interest is limited to successors, heirs, issue, or children, posthumous children are entitled to take in the same manner as if living at the death of their parent.

History: En. Sec. 1119, Civ. C. 1895; re-en. Sec. 4452, Rev. C. 1907; re-en. Sec. 6694, R. C. M. 1921. Cal. Civ. C. Sec. 698. Field Civ. C. Sec. 190.

Collateral References

Descent and Distribution \$\sim 47(3); Estates \$\infty\$1.

26A C.J.S. Descent and Distribution § 29; 31 C.J.S. Estates §§ 1, 2, 5, 14, 15, 17, 18, 132.

67-325. (6695) Qualities of expectant estates. Future interests pass by succession, will, and transfer, in the same manner as present interests.

History: En. Sec. 1120, Civ. C. 1895; re-en. Sec. 4453, Rev. C. 1907; re-en. Sec. 6695, R. C. M. 1921. Cal. Civ. C. Sec. 699. Field Civ. C. Sec. 191.

Collateral References

Deeds 7; Descent and Distribution 17; Wills € 7.

26 C.J.S. Deeds § 15; 26A C.J.S. Descent and Distribution § 62.

67-326. (6696) Same—mere possibility not an interest. A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind.

History: En. Sec. 1121, Civ. C. 1895; re-en. Sec. 4454, Rev. C. 1907; re-en. Sec. 6696, R. C. M. 1921. Cal. Civ. C. Sec. 700. Field Civ. C. Sec. 192.

Operation and Effect

This section being identical in terms with a section of the California Civil Code,

the presumption must be indulged that in adopting it the legislature intended that the same construction should prevail in this jurisdiction as prevailed in the state from which it was borrowed. Winslow v. Dundom, 46 M 71, 80, 125 P 136.

This section and section 67-1504 are

simply declaratory of the common law,

under which such intangible rights or interests as those mentioned in these sections cannot be transferred; but it was not the intention of the legislature, in enacting these sections, to make any change in the rule by which courts of equity were theretofore governed in dealing with this class of contracts. Winslow v. Dundom, 46 M 71, 80, 125 P 136.

67-327. (6697) **Interests in real property.** In respect to real or immovable property, the interests mentioned in this chapter are denominated estates and are specially named and classified in sections 67-502 to 67-905 and in sections 86-101 to 86-115.

History: En. Sec. 1122, Civ. C. 1895; re-en. Sec. 4455, Rev. C. 1907; re-en. Sec. 6697, R. C. M. 1921. Cal. Civ. C. Sec. 701. Field Civ. C. Sec. 193.

Compiler's Note

Sections 67-513, and 67-515 to 67-518, contained in the reference referred to above, were repealed by Sec. 3, Ch. 213, Laws 1959.

67-328. (6698) **Same—names and classification of interests.** The names and classification of interests in real property have only such application to interests in personal property as is in this division of the code expressly provided.

History: En. Sec. 1123, Civ. C. 1895; re-en. Sec. 4456, Rev. C. 1907; re-en. Sec. 6698, R. C. M. 1921. Cal. Civ. C. Sec. 702. Field Civ. C. Sec. 194.

NOTE.—The "division" above referred to was a division of the Revised Codes of 1907 and included sections which are now the following sections of the code: 29-201 to 29-206, 33-101 to 33-129, 39-101 to 39-132, 67-201 to 67-421, 67-501 to 67-512, 67-514, 67-519 to 67-905, 67-1101 to 67-1713, 86-101 to 86-115, 89-801 to 89-845, 91-101 to 91-418, and 91-422.

67-329. (6699) What future interests are recognized. No future interest in property is recognized by the law, except such as is defined in this division of the code.

History: En. Sec. 1124, Civ. C. 1895; re-en. Sec. 4457, Rev. C. 1907; re-en. Sec. 6699, R. C. M. 1921. Cal. Civ. C. Sec. 703. Field Civ. C. Sec. 195. NOTE.—See note to Sec. 67-328.

CHAPTER 4

CONDITIONS AND LIMITATIONS OF OWNERSHIP

Section 67-401. Fixing the time of enjoyment.

67-402. Conditions.

67-403. Certain conditions precedent void. 67-404. Conditions restraining marriage void.

67-405. Conditions restraining alienation void.

67-406. How long it may be suspended.

67-407. Future interests suspending power of alienation void.

67-408. Leases of agricultural and other lands.

67-409. Leases of city or town lots for over seventy-five years, void.

67-410. Dispositions of income.

67-411. Accumulations—when void.

67-412. Accumulations of income.

67-413. Other directions—when void in part. 67-414. Application of income to support, etc.

67-415. Increase of property.

67-416. In certain cases who entitled to income of property.

67-417. Future interests—when defeated.

67-418. Same—how defeated.

67-419. Future interests—when not defeated.

67-420. Same—contingency happening, how future interest takes effect.

67-421. Income—of what consists.

67-422. Repealed.

67-423. Pension trusts—inapplicability of statutory and common-law limitations.

67-424. Validity of pension trusts.

67-401. (6700) Fixing the time of enjoyment. The time when the enjoyment of property is to begin or end may be determined by computation, to be made to depend on event. In the latter case, the enjoyment is said to be upon condition.

History: En. Sec. 1140, Civ. C. 1895; re-en. Sec. 4458, Rev. C. 1907; re-en. Sec. 6700, R. C. M. 1921. Cal. Civ. C. Sec. 707. Field Civ. C. Sec. 196.

Operation and Effect

The reversionary interest an owner of oil land has on termination of a lease thereon, or the possibility of reverter, is a vested interest which may be conveyed and the time when the enjoyment thereof shall begin may be made to depend upon a future event. Krutzfeld v. Stevenson, 86 M 463, 477, 284 P 553.

Collateral References

Estates \$\infty 7.

31 C.J.S. Estates §§ 9, 11, 20.

67-402. (6701) **Conditions.** Conditions are precedent or subsequent. The former fix the beginning, the latter the ending, of the right.

History: En. Sec. 1141, Civ. C. 1895; re-en. Sec. 4459, Rev. C. 1907; re-en. Sec. 6701, R. C. M. 1921. Cal. Civ. C. Sec. 708. Field Civ. C. Sec. 197.

Collateral References

19 Am. Jur. 520, Estates, §§ 58 et seq.

67-403. (6702) Certain conditions precedent void. If a condition precedent requires the performance of an act wrong of itself, the instrument containing it is so far void, and the right cannot exist. If it requires the performance of an act not wrong of itself, but otherwise unlawful, the instrument takes effect and the condition is void.

History: En. Sec. 1142, Civ. C. 1895; 6702, R. C. M. 1921. Cal. Civ. C. Sec. 709. re-en. Sec. 4460, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 198.

67-404. (6703) Conditions restraining marriage void. Conditions imposing restraints upon marriage, except upon the marriage of a minor, are void; but this does not affect limitations where the intent was not to forbid marriage, but only to give the use until marriage.

History: En. Sec. 1143, Civ. C. 1895; re-en. Sec. 4461, Rev. C. 1907; re-en. Sec. 6703, R. C. M. 1921. Cal. Civ. C. Sec. 710. Based on Field Civ. C. Sec. 199.

Collateral References

Contracts 111; Estates 7; Wills 647.

17 C.J.S. Contracts §§ 233, 234; 31 C.J.S. Estates §§ 9, 11, 20; 96 C.J.S. Wills § 985 et seq.

Conditions, conditional limitations, or contracts in restraint of marriage. 122 ALR 7.

Validity of provision of deed prohibiting, penalizing, or requiring marriage to one of a particular religious faith. 50 ALR 2d 740.

67-405. (6704) Conditions restraining alienation void. Conditions restraining alienation, when repugnant to the interest created, are void.

History: En. Sec. 1144, Civ. C. 1895; re-en. Sec. 4462, Rev. C. 1907; re-en. Sec. 6704, R. C. M. 1921. Cal. Civ. C. Sec. 711. Field Civ. C. Sec. 200.

Operation and Effect

Where there was added to a printed warranty deed the typewritten statement that the grantees agreed not to sell or dis-

pose of the land except to the grantors or their heirs, the typewritten words violated this section, and did not limit the interest conveyed to a life estate. In re Vincent's Estate, 133 M 424, 324 P 2d 403, 411.

Collateral References

Perpetuities 5-7.

70 C.J.S. Perpetuities §§ 27, 43.

41 Am. Jur. 108, Perpetuities and Restraints on Alienation, §§ 66 et seq.

- 67-406. (6705) How long it may be suspended. (a) The absolute power of alienation cannot be suspended by any limitation or condition whatever, for a period longer than twenty-one (21) years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of suspension must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain.
- (b) When interest must vest. No interest in real or personal property shall be good unless it must vest not later than twenty-one (21) years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous nor so situated that evidence of their deaths is likely to be unreasonably difficult to obtain. It is intended by the enactment of this statute to make effective in this state the American common-law rule against perpetuities.

History: En. Sec. 1150, Civ. C. 1895; re-en. Sec. 4463, Rev. C. 1907; re-en. Sec. 6705, R. C. M. 1921; amd. Sec. 1, Ch. 213, L. 1959. Cal. Civ. C. Sec. 715. Based on Field Civ. C. Sec. 201.

Collateral References

Perpetuities 5-7.
70 C.J.S. Perpetuities § 49.

41 Am. Jur. 47, Perpetuities and Restraints on Alienation.

Validity, under rule against perpetuities, of gift in remainder to creator's

great grandchildren, following successive life estates to children and grandchildren. 18 ALR 2d 671.

Validity of restraint on alienation, of an estate in fee, ending not later than expiration of a life or lives in being. 42 ALR 2d 1243.

Law Review

Cromwell, "The Improvement of Conveyancing in Montana—A Proposal," 22 Mont. L. Rev. 26, 34 (Fall 1960).

DECISIONS UNDER FORMER LAW

Declaration of Trust Held Not Invalid

Where under the terms of the declaration of a common-law trust the trustees had absolute power of alienation of the property of the trust at any time in their discretion, the trust may not be declared invalid as in violation of the statutes prohibiting restraints on the power of alienation (67-406, 67-407, 67-511 and 67-512). Hodgkiss v. Northland Petroleum Consolidated, 104 M 328, 339, 67 P 2d 811.

Lives in Being

Under this section allowing suspension of absolute power of alienation for period during continuance of lives of persons in being at creation of limitation or condition, and no longer, duration of lives in being, and not merely time alone, is ultimate measure of period of suspension. In re Hartwig's Estate, 119 M 359, 175 P 2d 178, 180.

Minority of Children

Mere minority of children, which under the provisions of a will prevents a postponement of the vesting of title to property bequeathed or devised to them until reaching majority, does not work a suspension of the power of alienation for the period prescribed in the statutes; nor does postponement of possession or enjoyment thereof prevent the interest of the heir from vesting or from being conveyed or transferred. In re Murphy's Estate, 99 M 114, 125, 43 P 2d 233.

Rule against Perpetuities

The rule against perpetuities is directed toward the prevention of the vesting of estates at remote periods of time and is distinguished from statutes prohibiting the suspension of the power of alienation for a prescribed period, such statutes not insisting upon the vesting of estates, but

only upon their alienability. In re Murphy's Estate, 99 M 114, 125, 43 P 2d 233.

Trust for Maintenance of Hotel

Direction in will that executor reduce a sufficient amount of the estate to cash for

the erection and maintenance of a modern hotel to be maintained as a memorial to the testatrix was void as in violation of this section. In re Swayze's Estate, 120 M 546, 191 P 2d 322, 325.

67-407. (6706) Future interests suspending power of alienation void. Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed. The period of time during which an interest is destructible pursuant to the uncontrolled volition and for the exclusive personal benefit of the person having such a power of destruction is not to be included in determining the existence of a suspension of the absolute power of alienation or the permissible period for the vesting of an interest within the rule against perpetuities.

History: En. Sec. 1151, Civ. C. 1895; re-en. Sec. 4464, Rev. C. 1907; re-en. Sec. 6706, R. C. M. 1921; amd. Sec. 2, Ch. 213, L. 1959. Cal. Civ. C. Sec. 716. Field Civ. C. Sec. 202.

Law Review

Cromwell, "The Improvement of Conveyancing in Montana—A Proposal," 22 Mont. L. Rev. 26, 34 (Fall 1960).

DECISIONS UNDER FORMER LAW

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Where under the terms of the declaration of a common-law trust the trustees had absolute power of alienation of the property of the trust at any time in their discretion, the trust may not be declared invalid as in violation of the statutes prohibiting restraints on the power of alienation (67-406, 67-407, 67-511 and 67-512). Hodgkiss v. Northland Petroleum Consolidated, 104 M 328, 339, 67 P 2d 811.

Lives in Being Plus Fixed Term

A will devising realty to a trustee on termination of widow's life estate therein, for ten-year period, without power to alienate, with directions to pay proceeds of sale of realty at termination of ten-year period to testator's children, with the share of a deceased child going to such child's children, whenever born, suspended absolute power to alienate the trust property longer than designated lives in being and hence was void under this section. In re Hartwig's Estate, 119 M 359, 175 P 2d 178, 180.

Minority of Children

Mere minority of children, which under the provisions of a will prevents a postponement of the vesting of title to property bequeathed or devised to them until reaching majority, does not work a suspension of the power of alienation for the period prescribed in the statutes; nor does postponement of possession or enjoyment thereof prevent the interest of the heir from vesting or from being conveyed or transferred. In re Murphy's Estate, 99 M 114, 125, 43 P 2d 233.

Possibility of Unlawful Suspension

If by terms of trust instrument there is any possibility of absolute powers of alienation being suspended for a longer period than designated lives in being, the instrument in so far as it creates such limitation is void under this section and court cannot indulge in probability that named beneficiaries in trust in being at time of its creation or their survivors will be alive at end of trust period and thereby save the trust. In re Hartwig's Estate, 119 M 359, 175 P 2d 178, 180.

Rule against Perpetuities

The rule against perpetuities is directed toward the prevention of the vesting of estates at remote periods of time and is distinguished from statutes prohibiting the suspension of the power of alienation for a prescribed period, such statutes not insisting upon the vesting of estates, but only upon their alienability. In re Murphy's Estate, 99 M 114, 125, 43 P 2d 233.

67-408. (6707) Leases of agricultural and other lands. No lease or grant of agricultural lands for agricultural purposes, for a longer period

than ten (10) years, in which shall be reserved any rent or service of any kind, shall be valid; provided, that the foregoing shall not limit or affect leases with option to purchase made by the farm security administration of the United States department of agriculture, but leases or grants of lands, lying outside the limits of cities and towns, for any purpose, other than for agricultural purposes, may be for such period as may be agreed to by the parties to such leases or grants.

History: En. Sec. 1152, Civ. C. 1895; re-en. Sec. 4465, Rev. C. 1907; amd. Sec. 1, Ch. 172, L. 1919; re-en. Sec. 6707, R. C. M. 1921; amd. Sec. 1, Ch. 151, L. 1941. Cal. Civ. C. Sec. 717.

Cross-Reference

Leases for more than year to be in writing, sec. 13-606.

Agricultural Lands

This section, prior to its amendment, was held to be a limitation only upon the right to lease agricultural land for agricultural purposes. Lerch v. Missoula Brick & Tile Co., 45 M 314, 323, 123 P 25.

A half-acre tract of land in Park County completely isolated, on which was situated a cabin surrounded by a cement sidewalk, a pumphouse and a lawn, was not used for agricultural purposes notwithstanding that

parts of it may have been capable of being used or were used for growing vegetables in connection with its use for recreational purposes. Bookout v. White, 123 M 459, 214 P 2d 861, 17 ALR 2d 562.

References

Corey v. Sunburst Oil & Gas Co., 72 M 383, 394, 233 P 909; Montana Consolidated Mines Corp. v. O'Connell, 107 M 273, 283, 85 P 2d 345.

Collateral References

Landlord and Tenant 30; Mines and Minerals 58.

52 C.J.S. Landlord and Tenant § 444; 58 C.J.S. Mines and Minerals § 167.

Construction and effect of statutes limiting duration of agricultural leases. 17 ALR 2d 566.

67-409. (6708) Leases of city or town lots for over seventy-five years, void. No lease or grant of any town or city lot for a period longer than seventy-five years in which shall be reserved any rent or service of any kind shall be valid.

History: En. Sec. 1153, Civ. C. 1895; re-en. Sec. 4466, Rev. C. 1907; re-en. Sec. 6708, R. C. M. 1921; amd. Sec. 1, Ch. 147, L. 1929. Cal. Civ. C. Sec. 718.

Cross-Reference

Leases for more than one year to be in writing, sec. 13-606.

Operation and Effect

This section applies to city and town lots, and has no bearing upon section 67-

408. Lerch v. Missoula Brick & Tile Co., 45 M 314, 325, 123 P 25.

The words "city lot" mean a lot within the limits of a city, regardless of its other characteristics. Lerch v. Missoula Brick & Tile Co., 45 M 314, 325, 123 P 25.

Collateral References

Landlord and Tenant \$30. 52 C.J.S. Landlord and Tenant § 444.

67-410. (6709) Dispositions of income. Dispositions of the income of the property to accrue, and to be received at any time subsequent to the execution of the instrument creating such disposition, are governed by the rules prescribed in sections 67-301 to 67-420 in relation to future interests.

History: En. Sec. 1160, Civ. C. 1895; re-en. Sec. 4467, Rev. C. 1907; re-en. Sec. 6709, R. C. M. 1921. Cal. Civ. C. Sec. 722. Field Civ. C. Sec. 204.

Collateral References

Assignments 3. 6 C.J.S. Assignments § 6.

67-411. (6710) **Accountlations—when void.** All directions for the accumulation of the income of property, except such as are allowed by sections 67-301 to 67-420, are void.

History: En. Sec. 1161, Civ. C. 1895; re-en. Sec. 4468, Rev. C. 1907; re-en. Sec. 6710, R. C. M. 1921. Cal. Civ. C. Sec. 723. Field Civ. C. Sec. 205.

Collateral References

Perpetuities 9. 70 C.J.S. Perpetuities § 32.

Trustee's right to accumulate income under will or other instrument directing him to use it. 8 ALR 915.

Disregarding instruction to accumulate income for child in instrument creating

child's estate. 121 ALR 204.

Construction of specific provision of will or trust instrument giving executor or trustee power to determine what is income or what is principal. 27 ALR 2d 1323.

67-412. (6711) Accumulations of income. An accumulation of the income of property may be directed by any will, trust or transfer in writing sufficient to pass the property or create the trust out of which the fund is to arise, for the benefit of one or more persons, objects or purposes, to commence within the time permitted for the vesting of future interests and not to extend beyond the period limiting the time within which the absolute power of alienation of property may be suspended as prescribed by law.

History: En. Sec. 1162, Civ. C. 1895; re-en. Sec. 4469, Rev. C. 1907; re-en. Sec. 6711, R. C. M. 1921; amd. Sec. 1, Ch. 212,

L. 1939. Cal. Civ. C. Sec. 724. Field Civ.C. Sec. 206.

67-413. (6712) Other directions—when void in part. If the direction for an accumulation of the income of property is for a longer term than is limited in the last section (section 67-412, Revised Codes of Montana, 1947), the direction only, whether separable or not from the other provisions of the instrument, is void as respects the time beyond the limit prescribed in said last section, and no other part of such instrument is affected by the void portion of such direction.

History: En. Sec. 1163, Civ. C. 1895; L. 1957. Cal. Civ. C. Sec. 725. Field Civ. re-en. Sec. 4470, Rev. C. 1907; re-en. Sec. C. Sec. 207. 6712, R. C. M. 1921; amd. Sec. 1, Ch. 144,

67-414. (6713) Application of income to support, etc. When one or more persons for whose benefit an accumulation of income has been directed is or are destitute of other sufficient means of support or education, the proper court, upon application, may direct a suitable sum to be applied thereto out of the fund directed to be accumulated for the benefit of such person or persons.

History: En. Sec. 1164, Civ. C. 1895; re-en. Sec. 4471, Rev. C. 1907; re-en. Sec. 6713, R. C. M. 1921; amd. Sec. 2, Ch. 212, L. 1939. Cal. Civ. C. Sec. 726. Field Civ. C. Sec. 208.

Power of trustee or court to intrench corpus when income is insufficient to pay amount which the trust instrument directs to be paid to beneficiary out of income. 136 ALR 69 and 67 ALR 2d 1393.

Collateral References

Infants \$\infty\$ 34, 276 and other particular topics.

43 C.J.S. Infants §§ 57, 58, 70.

67-415. (6714) **Increase of property.** The owner of a thing also owns all of its products and accessions.

History: En. Sec. 1170, Civ. C. 1895; re-en. Sec. 4472, Rev. C. 1907; re-en. Sec. 6714, R. C. M. 1921. Cal. Civ. C. Sec. 732. Field Civ. C. Sec. 209.

Operation and Effect

Under this section the jury was properly instructed, in an action of claim and delivery to recover possession of a mare

and colt, that if the mare had been given to defendant, verdict should be for her for the possession of the animal "and for any increase or offspring thereof," even though plaintiff was in the actual possession of dam at the time the colt was foaled, and when defendant took both animals. Frank v. Symons, 35 M 56, 62, 88 P 561.

A deposit in a bank to indemnify sureties on a bond against possible loss being a pledge, title to it, as between the principal and the sureties, is in the former, and the accretions or profits, if any, belong to him, and not to the sureties. Leggat v. Palmer, 39 M 302, 308, 102 P 327.

Collateral References

Accession \$\sim 1. 1 C.J.S. Accession \\$\\$ 1-5.

67-416. (6715) In certain cases who entitled to income of property. When, in consequence of a valid limitation of a future interest, there is a suspension of the power of alienation or of the ownership during the continuation of which the income is undisposed of, and no valid direction for its accumulation is given, such income belongs to the person presumptively entitled to the next eventual interest.

History: En. Sec. 1171, Civ. C. 1895; re-en. Sec. 4473, Rev. C. 1907; re-en. Sec. 6715, R. C. M. 1921. Cal. Civ. C. Sec. 733. Field Civ. C. Sec. 210.

Collateral References

Estates 1 and other particular topics. 31 C.J.S. Estates §§ 1, 2, 5, 14, 15, 17, 18, 132.

67-417. (6716) Future interests—when defeated. A future interest, depending on the contingency of the death of any person without successors, heirs, issue, or children, is defeated by the birth of a posthumous child of such person, capable of taking by succession.

History: En. Sec. 45, p. 486, Bannack Stat.; re-en. Sec. 45, p. 403, Cod. Stat. 1871; re-en. Sec. 222, 5th Div. Rev. Stat. 1879; re-en. Sec. 280, 5th Div. Comp. Stat. 1887; amd. Sec. 1180, Civ. C. 1895; re-en. Sec. 4474, Rev. C. 1907; re-en. Sec. 6716, R. C. M. 1921. Cal. Civ. C. Sec. 739. Field Civ. C. Sec. 211.

Collateral References

Descent and Distribution 47(3); Estates 1.

26A C.J.S. Descent and Distribution § 29; 31 C.J.S. Estates §§ 1, 2, 5, 14, 15, 17, 18, 132.

67-418. (6717) Same—how defeated. A future interest may be defeated in any manner or by any act or means which the party creating such interest provided for or authorized in the creation thereof; nor is the future interest, thus liable to be defeated, to be on that ground adjudged void in its creation.

History: En. Sec. 1181, Civ. C. 1895; 6717, R. C. M. 1921. Cal. Civ. C. Sec. 740. re-en. Sec. 4475, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 212.

67-419. (6718) Future interests—when not defeated. No future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent interest, nor by destruction of such precedent interest by forfeiture, surrender, merger, or otherwise, except as provided by the next section, or where a forfeiture is imposed by statute as a penalty for the violation thereof.

History: En. Sec. 1182, Civ. C. 1895; 6718, R. C. M. 1921. Cal. Civ. C. Sec. 741. re-en. Sec. 4476, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 213.

67-420. (6719) Same—contingency happening, how future interest takes effect. No future interest, valid in its creation, is defeated by the determination of the precedent interest before the happening of the contingency on

which the future interest is limited to take effect; but should such contingency afterwards happen, the future interest takes effect in the same manner and to the same extent as if the precedent interest had continued to the same period.

History: En. Sec. 1183, Civ. C. 1895; re-en. Sec. 4477, Rev. C. 1907; re-en. Sec. 6719, R. C. M. 1921. Cal. Civ. C. Sec. 742. Field Civ. C. Sec. 214.

Collateral References
Remainders 10.
31 C.J.S. Estates § 91 et seq.

67-421. (6720) **Income—of what consists.** The income of property, as the term is used in this part of the code, includes the rents and profits of real property, the interest of money, dividends upon stock, and other produce of personal property.

History: En. Sec. 1190, Civ. C. 1895; re-en. Sec. 4478, Rev. C. 1907; re-en. Sec. 6720, R. C. M. 1921. Cal. Civ. C. Sec. 748. Field Civ. C. Sec. 215.

Collateral References Property € 7. 73 C.J.S. Property § 13.

67-422. (6721) Repealed—Chapter 213, Laws of 1959.

Repeal

This section (Sec. 1191, Civ. C. 1895), relating to the time of creation of a limi-

tation, condition or future interest, was repealed by Sec. 3, Ch. 213, Laws 1959.

67-423. Pension trusts—inapplicability of statutory and common-law limitations. No statutory or common-law rule or provision relating to restraints against alienation, suspension of the power of alienation, accumulations of income, perpetuities or remoteness of vesting shall apply to any trust heretofore or hereafter created as part of a pension, retirement, insurance, savings, stock bonus, profit-sharing or similar plan established or maintained for the benefit of employees, eligible to participate in such plan, of an employer or of a group of employers, or for the benefit of the members, eligible to participate in such plan, of any labor union or of any other association or group of employees, or for the benefit of other beneficiaries eligible to participate in such plan.

History: En. Sec. 1, Ch. 214, L. 1959.

67-424. Validity of pension trusts. Any such trust shall be valid, not-withstanding any such statutory or common-law rule or provision, which but for this act, might otherwise be applicable to and invalidate such trust.

History: En. Sec. 2, Ch. 214, L. 1959.

CHAPTER 5

REAL PROPERTY AND ESTATES THEREIN

Section 67-501. Real property-how governed.

67-502. Enumeration of estates.

67-503. What estate a fee simple.

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67-512. Suspension by trust.

67-513. Repealed.

67-514. Remainders—future and contingent estates, how created.

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67-519. Remainder upon a contingency.

67-520. Remainder to heirs of tenant for life-effect of.

67-521. Construction of certain remainders.

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67-523. Notice of terminating tenancy at will.

67-524. Effect of notice.

67-525. Re-entry-when and how to be made.

67-526. Summary proceedings in certain cases—how provided for.

67-527. Notice not necessary before action.

67-501. (6722) Real property—how governed. Real property within this state is governed by the law of this state, except where the title is in the United States.

History: En. Sec. 1200, Civ. C. 1895; re-en. Sec. 4480, Rev. C. 1907; re-en. Sec. 6722, R. C. M. 1921. Cal. Civ. C. Sec. 755.

Cross-References

Limitation of actions concerning real property, sec. 93-2501.

Limitation of actions for injury to property, sec. 93-2607.

References

Gas Products Co. v. Rankin, 63 M 372, 388, 207 P 993, 24 ALR 294; Habets v. Carey Land Act Board, 126 M 46, 244 P 2d 511, 512.

Collateral References

Property 5-6. 73 C.J.S. Property § 12.

67-502. (6723) Enumeration of estates. Estates in real property, in respect to the duration of their enjoyment, are either:

- 1. Estates of inheritance or perpetual estates;
- Estates for life:
- Estates for years;
- Estates from year to year, quarter to quarter, month to month, week to week, day to day, and for other indefinite and unascertained durations of enjoyment whatsoever, except estates or tenancies at will; or
 - Estates at will.

History: En. Sec. 1210, Civ. C. 1895; re-en. Sec. 4481, Rev. C. 1907; re-en. Sec. 6723, R. C. M. 1921; amd. Sec. 1, Ch. 48, L. 1931. Cal. Civ. C. Sec. 761. Field Civ. C. Sec. 218.

Cross-Reference

Quieting title, secs. 93-6203 to 93-6216.

Estates by Sufferance

It is not likely that this section has the effect of destroying estates by sufferance as known at common law, and making them estates at will. Power Mercantile Co. v. Moore Mercantile Co., 55 M 401, 411, 177 P 406.

Lease for Years

A lease for years is a chattel real. Wheeler v. McIntyre, 55 M 295, 301, 175

Lease of Realty Not Real Estate

A lease of real property is not real estate under this or section 67-506 so that

a contract employing a broker to secure or sell a lease need not be in writing and is not within the statute of frauds (13-606, subd. 6). O'Neill v. Wall, 103 M 388, 391, 62 P 2d 672 (same rule applies to

option to purchase realty).

Where person entered into possession of offices under oral agreement to pay \$100 per month in advance as rent therefor and without any new agreement such person held over for a considerable period of time paying to landlords \$100 on or before 15th day of each month, such arrangement, under Ch. 48, Laws 1931 (this section), constituted the person a "tenant from month to month." State ex rel. Needham v. Justice Court, 119 M 89, 171 P 2d 351,

Notice Prior to Unlawful Detainer Action

Construing prior to amendment by Ch. 48, Laws 1931, a tenancy from month to month is in effect one at will and therefore the rule, under which the three-day

notice required by section 67-525, is a condition precedent to the right to commence an action in unlawful detainer, controls as to tenancy from month to month. (Mr. Justice Galen dissenting.) Boucher v. St. George, 88 M 162, 167, 293 P 315.

State Grazing Leases

An estate for years is an interest in land and the alienation of an interest by lease for a number of years is a disposal of such interest; hence the prohibition of section 1, article XVII, constitution, that none of the state lands "nor any estate or interest therein" shall be disposed of unless the full market value thereof be paid, applies to the leasing of state

grazing lands. Rider v. Cooney, 94 M 295, 307, 23 P 2d 261.

References

Standard Oil Co. v. Idaho Community Oil Co., 98 M 131, 37 P 2d 660; Brubaker v. D'Orazi, 120 M 22, 179 P 2d 538, 544; Cleveland-Arvin v. Cleveland, 123 M 463, 215 P 2d 963; In re Vincent's Estate, 133 M 424, 324 P 2d 403, 412.

Collateral References

Estates€ 1.

31 C.J.S. Estates §§ 1, 2, 5, 14, 15, 17, 18, 132.

Generally, see 19 Am. Jur. 457, Estates.

67-503. (6724) What estate a fee simple. Every estate of inheritance is a fee, and such estate, when not defeasible or conditional, is a fee simple or an absolute fee.

History: En. Sec. 1211, Civ. C. 1895; re-en. Sec. 4482, Rev. C. 1907; re-en. Sec. 6724, R. C. M. 1921. Cal. Civ. C. Sec. 762. Based on Field Civ. C. Sec. 219.

Fee Simple

A fee-simple title signifies an estate of inheritance clear of any condition, limitation or restriction; it stands at the head of estates as the highest in dignity and the most ample in extent. Gantt v. Harper, 82 M 393, 404, 267 P 296.

Marketable Title

A "marketable title," a "good title" and "clear title" are equivalent; they mean a title concerning which there is no fair or reasonable doubt, one which a court of equity would compel a purchaser to accept in a suit by the vendor for specific performance, to wit: a fee-simple title. Gantt v. Harper, 82 M 393, 404, 267 P 296.

Timber Grants

Where a landowner conveyed growing timber, with a right of way over the land for the purpose of removing it, to the buyer, "his heirs and assigns forever," without limitation or condition, a feesimple estate in the timber passed to the grantee, and such grant was not defeated by the latter's failure to cut and remove it within a reasonable time. R. M. Cobban Realty Co. v. Donlan, 51 M 58, 66, 149 P 484.

References

Cleveland-Arvin v. Cleveland, 123 M 463, 215 P 2d 963.

Collateral References

19 Am. Jur. 471, Estates, §§ 13-27.

67-504. (6725) Estates tail abolished. Estates tail are abolished, and every estate which would be at common law adjudged to be a fee tail is a fee simple, and if no valid remainder is limited thereon, is a fee simple absolute.

History: En. Sec. 1212, Civ. C. 1895; re-en. Sec. 4483, Rev. C. 1907; re-en. Sec. 6725, R. C. M. 1921. Cal. Civ. C. Sec. 763. Based on Field Civ. C. Sec. 220.

References

Cleveland-Arvin v. Cleveland, 123 M 463, 215 P 2d 963.

Collateral References

Estates Tail € 2.
31 C.J.S. Estates § 29.
19 Am. Jur. 506, Estates, §§ 46-55.

67-505. (6726) Certain remainders valid. Where a remainder in fee is limited upon any estate, which would by the common law be adjudged a fee tail, such remainder is valid as a contingent limitation upon a fee, and vests

in possession on the death of the first taker, without issue living at the time of his death.

History: En. Sec. 1213, Civ. C. 1895; 6726, R. C. M. 1921. Cal. Civ. C. Sec. 764. re-en. Sec. 4484, Rev. C. 1907; re-en. Sec. Based on Field Civ. C. Sec. 221.

67-506. (6727) Freehold estates—chattels real—chattel interests. Estates of inheritance and for life are called estates of freehold; estates for years and estates embraced by the provisions of the fourth division of section 67-502, are chattels real; and estates at will are chattel interests, but are not liable as such to sale on execution.

History: En. Sec. 1214, Civ. C. 1895; re-en. Sec. 4485, Rev. C. 1907; re-en. Sec. 6727, R. C. M. 1921; amd. Sec. 1, Ch. 49, L. 1931. Cal. Civ. C. Sec. 765. Field Civ. C. Sec. 222.

Freeholder and Taxpayer Distinguished

Here the petition recites only that the signers are "citizens and taxpayers of road district No. 4"; a "freeholder" is one who holds an estate in real property, either of inheritance or for life (this section), while a "taxpayer" may be paying taxes on personal property alone. Warren v. Chouteau County, 82 M 115, 125, 265 P 676.

Lease for Years

A lease for years is a chattel real, both under this section and the common law. Wheeler v. McIntyre, 55 M 295, 301, 175 P 892.

Lease of Realty Not Real Estate

A lease of real property is not real estate under this or section 67-502, so that a contract employing a broker to secure or sell a lease need not be in writing and is not within the statute of frauds (13-606, subd. 6). O'Neill v. Wall, 103 M 388, 392, 62 P 2d 672 (same rule applies to option to purchase realty).

References

Kerlee v. Smith, 46 M 19, 22, 124 P 777; Williard v. Federal Surety Co., 91 M 465, 471, 8 P 2d 633; Brubaker v. D'Orazi, 120 M 22, 179 P 2d 538, 544.

Collateral References

Estates 1-4; Execution 33.
31 C.J.S. Estates § 1-3, 5, 7, 12, 14, 15, 17, 18, 132; 33 C.J.S. Executions § 36.

67-507. (6728) Estate for life of third person—when a freehold, etc. An estate, during the life of a third person, whether limited to heirs or otherwise, is a freehold.

History: En. Sec. 1215, Civ. C. 1895; re-en. Sec. 4486, Rev. C. 1907; re-en. Sec. 6728, R. C. M. 1921. Cal. Civ. C. Sec. 766.

Collateral References

Life Estates 1. 31 C.J.S. Estates §§ 30, 31, 33.

67-508. (6729) Future estates—how limited. A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time or otherwise, of a precedent estate created at the same time.

History: En. Sec. 1216, Civ. C. 1895; re-en. Sec. 4487, Rev. C. 1907; re-en. Sec. 6729, R. C. M. 1921. Cal. Civ. C. Sec. 767. Field Civ. C. Sec. 224.

References

Krutzfeld v. Stevenson, 86 M 463, 477, 284 P 553.

Collateral References

Estates ← 1; Remainders ← 1 and other particular topics.
31 C.J.S. Estates §§ 1, 2, 5, 14, 15, 17, 18,

31 C.J.S. Estates §§ 1, 2, 5, 14, 15, 17, 18 130, 132 et seq.

67-509. (6730) **Reversions.** A reversion is the residue of an estate left by operation of law in the grantor or his successors, or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised.

History: En. Sec. 1217, Civ. C. 1895; re-en. Sec. 4488, Rev. C. 1907; re-en. Sec. 6730, R. C. M. 1921. Cal. Civ. C. Sec. 768. Field Civ. C. Sec. 225.

References

Krutzfeld v. Stevenson, 86 M 463, 477, 284 P 553.

Collateral References

Reversions 1.

31 C.J.S. Estates § 105 et seq.

33 Am. Jur. 668, Life Estates, Remainders, and Reversions, §§ 194-214.

Grant to one for life, and afterwards, either absolutely or contingently, to grantor's heirs or next of kin, as leaving reversion or creating remainder. 16 ALR 2d 691.

Murder of life tenant by remainderman or reversioner as affecting latter's rights to remainder or reversion. 24 ALR 2d 1120

Destruction of possibility of reverter by transfer, 53 ALR 2d 224.

67-510. (6731) **Remainders.** When a future estate, other than a reversion, is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name.

History: En. Sec. 1218, Civ. C. 1895; re-en. Sec. 4489, Rev. C. 1907; re-en. Sec. 6731, R. C. M. 1921. Cal. Civ. C. Sec. 769. Field Civ. C. Sec. 226.

Collateral References

Remainders 1.

31 C.J.S. Estates § 68 et seq.

33 Am. Jur. 506, Life Estates, Remainders, and Reversions, §§ 44-193.

Character of remainder limited generally to the life tenant's children. 57 ALR 2d 103.

67-511. (6732) Suspended ownership. The absolute ownership of a term of years cannot be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.

History: En. Sec. 1219, Civ. C. 1895; re-en. Sec. 4490, Rev. C. 1907; re-en. Sec. 6732, R. C. M. 1921. Cal. Civ. C. Sec. 770.

Declaration of Trust Held Not Invalid

Where under the terms of the declaration of a common-law trust the trustees had absolute power of alienation of the property of the trust at any time in their discretion, the trust may not be declared invalid as in violation of the statutes prohibiting restraints on the power of alienation (67-406, 67-407, 67-511 and 67-512). Hodgkiss v. Northland Petroleum Consolidated, 104 M 328, 339, 67 P 2d 811.

Collateral References

Perpetuities 6. 70 C.J.S. Perpetuities § 43.

67-512. (6733) Suspension by trust. The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of section 67-406.

History: En. Sec. 1220, Civ. C. 1895; re-en. Sec. 4491, Rev. C. 1907; re-en. Sec. 6733, R. C. M. 1921. Cal. Civ. C. Sec. 771. Field Civ. C. Sec. 228.

Declaration of Trust Held Not Invalid

Where under the terms of the declaration of a common-law trust the trustees had absolute power of alienation of the property of the trust at any time in their discretion, the trust may not be declared invalid as in violation of the statutes prohibiting restraints on the power of alienation (67-406, 67-407, 67-511 and 67-512). Hodgkiss v. Northland Petroleum Consolidated, 104 M 328, 339, 67 P 2d 811.

Minority of Children

Mere minority of children, which under the provisions of a will prevents a post-ponement of the vesting of title to property bequeathed or devised to them until reaching majority, does not work a suspension of the power of alienation for the period prescribed in the statutes; nor does postponement of possession or enjoyment thereof prevent the interest of the heir from vesting or from being conveyed or transferred. In re Murphy's Estate, 99 M 114, 125, 43 P 2d 233.

Rule against Perpetuities

The rule against perpetuities is directed toward the prevention of the vesting of estates at remote periods of time and is distinguished from statutes prohibiting the suspension of the power of alienation for a prescribed period, such statutes not insisting upon the vesting of estates, but only upon their alienability. In re Murphy's Estate, 99 M 114, 125, 43 P 2d 233.

67-513. (6734) Repealed—Chapter 213, Laws of 1959.

Reneal

This section (Sec. 1221, Civ. C. 1895), relating to the creation of a contingent

remainder in fee after a prior remainder in fee, was repealed by Sec. 3, Ch. 213, Laws 1959.

67-514. (6735) Remainders—future and contingent estates, how created. Subject to the rules of sections 67-502 to 67-611 and of sections 67-201 to 67-422, a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years; and a fee may be limited on a fee upon a contingency, which, if it should occur, must happen within the period prescribed in this code.

History: En. Sec. 1222, Civ. C. 1895; re-en. Sec. 4493, Rev. C. 1907; re-en. Sec. 6735, R. C. M. 1921. Cal. Civ. C. Sec. 773. Field Civ. C. Sec. 230.

Compiler's Note

Sections 67-422, 67-513 and 67-515 to 67-518, contained in the reference referred

to above, were repealed by Sec. 3, Ch. 213, Laws 1959.

Collateral References

Remainders 3, 4. 31 C.J.S. Estates § 70 et seq.

67-515 to 67-518. (6736 to 6739) Repealed—Chapter 213, Laws of 1959.

Renea

These sections (Secs. 1223 to 1226, Civ. C. 1895), relating to limitations on suc-

cessive life estates, remainders upon life estates and term of years, were repealed by Sec. 3, Ch. 213, Laws 1959.

67-519. (6740) Remainder upon a contingency. A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation.

History: En. Sec. 1227, Civ. C. 1895; 6740, R. C. M. 1921. Cal. Civ. C. Sec. 778. re-en. Sec. 4498, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 236.

67-520. (6741) Remainder to heirs of tenant for life—effect of. When a remainder is limited to the heirs or heirs of the body of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life.

History: En. Sec. 1228, Civ. C. 1895; re-en. Sec. 4499, Rev. C. 1907; re-en. Sec. 6741, R. C. M. 1921. Cal. Civ. C. Sec. 779. Field Civ. C. Sec. 237.

Collateral References Estates©=8. 31 C.J.S. Estates § 84.

67-521. (6742) Construction of certain remainders. When a remainder of an estate for life or for years is not limited on a contingency defeating or avoiding such precedent estate, it is to be deemed intended to take effect

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only on the death of the first taker, or the expiration, by lapse of time, of such term of years.

History: En. Sec. 1229, Civ. C. 1895; re-en. Sec. 4500, Rev. C. 1907; re-en. Sec. 6742, R. C. M. 1921. Cal. Civ. C. Sec. 780. Field Civ. C. Sec. 238.

Collateral References

Remainders 4½. 31 C.J.S. Estates § 83.

References

Kerlee v. Smith, 46 M 19, 22, 124 P 777.

67-522. (6743) **Effect of power of appointment.** A general or special power of appointment does not prevent the vesting of a future estate limited to take effect in case such power is not executed.

History: En. Sec. 1230, Civ. C. 1895; re-en. Sec. 4501, Rev. C. 1907; re-en. Sec. 6743, R. C. M. 1921. Cal. Civ. C. Sec. 781. Field Civ. C. Sec. 239.

Default-of-appointment provisions as limiting power otherwise general in nature. 9 ALR 2d 595.

Collateral References

Powers \$39.
72 C.J.S. Powers \$55.
41 Am. Jur. 803. Powers.

Election to take against will as extinguishing power of appointment. 38 ALR 2d 977.

Power of appointment as exclusive or nonexclusive. 69 ALR 2d 1285.

67-523. (6744) Notice of terminating tenancy at will. A tenancy or other estate at will, however created, may be terminated by the landlord's giving notice in writing to the tenant, in the manner prescribed in Title 93, to remove from the premises within a period of not less than one (1) month, to be specified in the notice; but none of the estates or tenancies embraced by the provisions of division four (4) of section 67-502 is a tenancy or estate at will.

History: En. Sec. 1240, Civ. C. 1895; re-en. Sec. 4502, Rev. C. 1907; re-en. Sec. 6744, R. C. M. 1921; amd. Sec. 1, Ch. 50, L. 1931. Cal. Civ. C. Sec. 789. Based on Field Civ. C. Sec. 240.

Contract to Purchase

Where a contract is made for the sale of real property, and the purchaser takes possession but makes default in payment, his mere occupancy of the premises does not convert him into a tenant at will; to create the relation of landlord and tenant there must be a contract, express or implied; and there cannot be an implied agreement for the occupancy of land, in the face of an express contract that the vendee thereof holds possession under his right to purchase. Arnold v. Fraser, 43 M 540, 548, 117 P 1064.

Notice of Change of Landlords

A notice to a tenant that at a day named a certain person would become his landlord, and that he should "take due and timely notice and act accordingly," is not such a notice as is required by this section to be given by a landlord for the purpose of terminating the tenancy. Centennial Brewing Co. v. Rouleau, 49 M 490, 503, 143 P 969.

Notice to Surrender Possession

An action in unlawful detainer to recover possession of real property from a tenant at will cannot be maintained, under section 93-9703 and this section, sections 67-524 and 67-525, without first terminating the tenancy by giving at least thirty days' notice in writing and, after its termination, giving three days' notice to surrender possession, and the complaint must show that both notices were given; hence where plaintiff alleged that the thirty-day notice was given but failed to aver that the three-day notice was likewise given, the complaint did not state a cause of action and the justice court before which the action was brought was without jurisdiction to try the cause. Boucher v. St. George, 88 M 162, 166, 167, 293 P 315.

NOTE.—The above case was decided July 19, 1930. By Ch. 48, Laws 1931, subd. 4, section 67-502 (6723) was amended, and by Ch. 50, Laws 1931, section 67-523 (6744) was amended. The effect of these two amendments was to change the law by eliminating the requirement of the 30-day notice in the case of the tenancies mentioned in subd. 4 of section 67-502 (6723). The Boucher case is apparently modified by the later amendments

in so far as concerns its holding as to the necessity of the 30 days' notice in such cases.

Void Lease

One who enters into possession of real property under a lease rendered void by the statute of frauds becomes a tenant at will, which tenancy may be terminated by giving the notice prescribed by this section. Centennial Brewing Co. v. Rouleau, 49 M 490, 503, 143 P 969.

References

Power Mercantile Co. v. Moore Mercantile Co., 55 M 401, 410, 177 P 406.

Collateral References

Landlord and Tenant 2117, 120. 51 C.J.S. Landlord and Tenant §§ 156, 175. 32 Am. Jur. 83, Landlord and Tenant,

§§ 68, 69.

67-524. (6745) **Effect of notice.** After such notice has been served, and the period specified by such notice has expired, but not before, the landlord may re-enter, or proceed according to law to recover possession.

History: En. Sec. 1241, Civ. C. 1895; re-en. Sec. 4503, Rev. C. 1907; re-en. Sec. 6745, R. C. M. 1921. Cal. Civ. C. Sec. 790. Based on Field Civ. C. Sec. 242.

References

Centennial Brewing Co. v. Rouleau, 49 M 490, 504, 143 P 969; Boucher v. St. George, 88 M 162, 167 et seq., 293 P 315.

Collateral References

Landlord and Tenant \$\infty 120(2), 275-283. 51 C.J.S. Landlord and Tenant \\$\\$ 152, 172, 173, 183.

67-525. (6746) Re-entry—when and how to be made. Whenever the right of re-entry is given to the grantor or lessor in any grant or lease, or otherwise, such re-entry may be made at any time after the right has accrued, upon three days' notice, as provided in Title 93.

History: En. Sec. 1242, Civ. C. 1895; re-en. Sec. 4504, Rev. C. 1907; re-en. Sec. 6746, R. C. M. 1921. Cal. Civ. C. Sec. 791. Based on Field Civ. C. Sec. 243.

References

Power Mercantile Co. v. Moore Mercantile Co., 55 M 401, 410, 177 P 406; Boucher v. St. George, 88 M 162, 167 et seq., 293 P 315.

Collateral References

Landlord and Tenant@275-277; Reversions@5.

31 C.J.S. Estates § 105 et seq.; 52 C.J.S. Landlord and Tenant §§ 707, 718, 720, 723, 728.

33 Am. Jur. 687, Life Estates, Remainders, and Reversions, §§ 207-210.

67-526. (6747) Summary proceedings in certain cases—how provided for. Summary proceedings for obtaining possession of real property forcibly entered, or forcibly and unlawfully detained, are provided for in Title 93.

History: En. Sec. 1243, Civ. C. 1895; re-en. Sec. 4505, Rev. C. 1907; re-en. Sec. 6747, R. C. M. 1921. Cal. Civ. C. Sec. 792.

Collateral References

Forcible Entry and Detainer 22.
36A C.J.S. Forcible Entry and Detainer 3.
22 Am. Jur. 905, Forcible Entry and Detainer.

67-527. (6748) Notice not necessary before action. An action for the possession of real property leased or granted, with a right of re-entry, may be maintained at any time, in the district court, after the right to re-enter has accrued, without the notice prescribed in section 67-525.

History: En. Sec. 1244, Civ. C. 1895; re-en. Sec. 4506, Rev. C. 1907; re-en. Sec. 6748, R. C. M. 1921. Cal. Civ. C. Sec. 793. Field Civ. C. Sec. 244.

Collateral References

Ejectment 21; Landlord and Tenant 283.

28 C.J.S. Ejectment § 27; 52 C.J.S. Landlord and Tenant §§ 733-736.

CHAPTER 6

SERVITUDES

- Section 67-601. Servitudes attached to land.
 - 67-602. Servitudes not attached to land.
 - 67-603. Designation of estates.
 - 67-604. By whom grantable.
 - 67-605. By whom held.
 - 67-606. Extent of servitudes. 67-607. Apportioning easements.
 - 67-608. Rights of owner of future estate.
 - 67-609. Actions by owner and occupant of dominant tenement.
 - 67-610. Actions by owner of servient tenement.
 - 67-611. How extinguished.
- **67-601.** (6749) **Servitudes attached to land.** The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements:
 - 1. The right of pasture.
 - 2. The right of fishing.
 - 3. The right of taking game.
 - 4. The right of way.
 - 5. The right of taking water, wood, minerals, and other things.
 - 6. The right of transacting business upon land.
 - 7. The right of conducting lawful sports upon land.
- 8. The right of receiving air, light, or heat from or over, or discharging the same upon or over land.
- 9. The right of receiving water from or discharging the same upon land.
 - 10. The right of flooding land.
- 11. The right of having water flow without diminution or disturbance of any kind.
 - 12. The right of using a wall as a party wall.
- 13. The right of receiving more than natural support from adjacent land or things affixed thereto.
- 14. The right of having the whole of a division fence maintained by a coterminous owner.
- 15. The right of having public conveyances stopped, or of stopping the same on land.
 - 16. The right of a seat in church.
 - 17. The right of burial.

History: En. Sec. 1250, Civ. C. 1895; re-en. Sec. 4507, Rev. C. 1907; re-en. Sec. 6749, R. C. M. 1921. Cal. Civ. C. Sec. 801. Field Civ. C. Sec. 245.

Cross-Reference

Covenants running with the land, secs. 58-304 to 58-311.

Appurtenance as Easement

An appurtenance to land is in any and every case an easement. Smith v. Denniff, 24 M 20, 23, 60 P 398.

Ditch Right of Way

A right of way, and the right to a ditch, canal or other structure in which water is conveyed for irrigation or other lawful purposes, are easements over the land occupied by the ditch, canal, etc. An "easement" is an appurtenance to land, and constitutes an interest in real property. Mannix v. Powell County, 60 M 510, 512, 199 P 914.

Restrictive Covenant in Deed Creates Easement

Restrictive covenant in a deed forbidding sale of liquor on premises conveyed,

created a negative easement under this section, appurtenant to other lands of grantor as the dominant tenement. This easement was not destroyed by tax sale and issuance of tax deed conveying the servient tenement and the grantor could enforce the easement by obtaining an injunction against sale of liquor on the servient premises. Northwestern Improvement Co. v. Lowry, 104 M 289, 301, 66 P 2d 792.

Timber Right of Way

An easement for a right of way for cutting and hauling timber is realty under our law. R. M. Cobban Realty Co. v. Donlan, 51 M 58, 66, 149 P 484.

References

Power Mercantile Co. v. Moore Mercantile Co., 55 M 401, 408, 177 P 406; Powell v. Big Horn Low Line Ditch Co., 81 M 430, 263 P 692; Johnson v. Meiers, 118 M 258, 164 P 2d 1012, 1014; State v. McClure, 127 M 534, 268 P 2d 629, 635.

Collateral References

Easements 1-3 and other particular topics.

28 C.J.S. Easements §§ 1, 2, 3, 5, 8, 9, 20, 21, 22, 27.

Surface owner's right of access through solid mineral seam or vein conveyed to another, or through the space left by its removal, to reach underlying strata, water, oil and gas, etc. 25 ALR 2d 1250.

Conveyance of land as bounded by road, street, or other way as giving grantee rights in or to such way. 46 ALR 2d 461.

Rights, as between private parties, as to relocation of light and air easements, not originally arising by necessity. 80 ALR 2d 794.

Law Review

Cromwell, "Easements and Market Value," 17 Mont. L. Rev. 143 (Spring 1956).

67-602. (6750) **Servitudes not attached to land.** The following land burdens, or servitudes upon land, may be granted and held, though not attached to land:

- 1. The right of pasture, and of fishing and taking game.
- 2. The right of a seat in church.
- 3. The right of burial.
- 4. The right of taking rents and tolls.
- 5. The right of way.
- 6. The right of taking water, wood, minerals, or other things.

History: En. Sec. 1251, Civ. C. 1895; re-en. Sec. 4508, Rev. C. 1907; re-en. Sec. 6750, R. C. M. 1921. Cal. Civ. C. Sec. 802. Based on Field Civ. C. Sec. 246.

Operation and Effect

A water right, legally acquired, is in the nature of an easement in gross which, according to circumstances, may or may not be an easement annexed or attached to certain land as an appurtenant thereto. Smith v. Denniff, 24 M 20, 24, 60 P 398.

References

Rodda v. Best, 68 M 205, 215, 217 P 669; State v. McClure, 127 M 534, 268 P 2d 629, 635.

Collateral References

17A Am. Jur. 616 Easements, generally.

67-603. (6751) **Designation of estates.** The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is held is called the servient tenement.

History: En. Sec. 1252, Civ. C. 1895; re-en. Sec. 4509, Rev. C. 1907; re-en. Sec. 6751, R. C. M. 1921. Cal. Civ. C. Sec. 803. Field Civ. C. Sec. 247.

References

Northwestern Improvement Co. v. Lowry, 104 M 289, 302, 66 P 2d 792, 110 ALR 605.

67-604. (6752) **By whom grantable.** A servitude can be created only by one who has a vested estate in the servient tenement.

History: En. Sec. 1253, Civ. C. 1895; re-en. Sec. 4510, Rev. C. 1907; re-en. Sec. 6752, R. C. M. 1921. Cal. Civ. C. Sec. 804. Field Civ. C. Sec. 248.

Collateral References

17A Am. Jur. 631, Easements, §§ 18-20.

67-605. (6753) **By whom held.** A servitude thereon cannot be held by the owner of the servient tenement.

History: En. Sec. 1254, Civ. C. 1895; re-en. Sec. 4511, Rev. C. 1907; re-en. Sec. 6753, R. C. M. 1921, Cal. Civ. C. Sec. 805. Field Civ. C. Sec. 249.

References

Smith v. Denniff, 24 M 20, 25, 60 P 398.

67-606. (6754) Extent of servitudes. The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired.

History: En. Sec. 1255, Civ. C. 1895; re-en. Sec. 4512, Rev. C. 1907; re-en. Sec. 6754, R. C. M. 1921. Cal. Civ. C. Sec. 806. Field Civ. C. Sec. 250.

Ditch Rights

Though a person has acquired a right by prescription to maintain a ditch diagonally across the town lots of another person, that does not carry with it the right to enlarge the ditch, to change its course materially, or to make a new ditch over such lots. Babcock v. Gregg, 55 M 317, 320, 178 P 284.

The extent of an easement acquired by adverse user is measured by the extent of the use; hence evidence of the amount of water which had been or could be used through a ditch, title to which rested upon prescription, was admissible. Lowry v. Carrier, 55 M 392, 396, 177 P 756.

Water rights and ditch rights are separate and distinct property rights, i. e.,

one may own a water right without a ditch right, or a ditch right without a water right. Maclay v. Missoula Irr. Dist., 90 M 344, 355, 3 P 2d 286.

While, ordinarily, joint owners of a ditch are tenants in common, each entitled to its use, where such owners of an irrigation system, supplying a subdivided tract, owned an interest in the main canal and the laterals only to such point as was necessary for the conduct of water to their lands, the joint ownership of the canal extended only to the point of diversion to each owner's land, and no subsequent owner acquired a greater right or easement therein. Maelay v. Missoula Irr. Dist., 90 M 344, 355, 3 P 2d 286.

Collateral References

Easements \$39-45. 28 C.J.S. Easements §§ 73-78. 17A Am. Jur. 718, Easements, §§ 112-118.

67-607. (6755) Apportioning easements. In case of partition of the dominant tenement, the burden must be apportioned according to the division of the dominant tenement, but not in such a way as to increase the burden upon the servient tenement.

History: En. Sec. 1256, Civ. C. 1895; re-en. Sec. 4513, Rev. C. 1907; re-en. Sec. 6755, R. C. M. 1921. Cal. Civ. C. Sec. 807. Field Civ. C. Sec. 251.

Modification of Easement

Where grantor reserved an easement in land conveyed, city purchasing land from grantee could not obtain modification of easement based on need. Missoula v. Mix, 123 M 365, 214 P 2d 212.

References

Maclay v. Missoula Irr. Dist., 90 M 344, 355, 3 P 2d 286; Yegen v. Cardwell, 133 M 236, 321 P 2d 1077, 1079.

Collateral References

Trial ≥ 88. 88 C.J.S. Trial § 207 et seq.

67-608. (6756) Rights of owner of future estate. The owner of a future estate in a dominant tenement may use easements attached thereto for the purpose of viewing waste, demanding rent, or removing an obstruction to the enjoyment of such easements, although such tenement is occupied by a tenant.

History: En. Sec. 1257, Civ. C. 1895; re-en. Sec. 4514, Rev. C. 1907; re-en. Sec. 6756, R. C. M. 1921. Cal. Civ. C. Sec. 808. Field Civ. C. Sec. 252.

Collateral References

Easements €52. 28 C.J.S. Easements §§ 90-92. 67-609. (6757) Actions by owner and occupant of dominant tenement. The owner of any estate in a dominant tenement, or the occupant of such tenement, may maintain an action for the enforcement of an easement attached thereto.

History: En. Sec. 1258, Civ. C. 1895; re-en. Sec. 4515, Rev. C. 1907; re-en. Sec. 6757, R. C. M. 1921. Cal. Civ. C. Sec. 809. Field Civ. C. Sec. 253.

References

Mannix v. Powell County, 60 M 510, 513, 199 P 914.

Collateral References

Easements € 61(7). 28 C.J.S. Easements § 109.

67-610. (6758) Actions by owner of servient tenement. The owner in fee of a servient tenement may maintain an action for the possession of the land, against any one unlawfully possessed thereof, though a servitude exists thereon in favor of the public.

History: En. Sec. 1259, Civ. C. 1895; re-en. Sec. 4516, Rev. C. 1907; re-en. Sec. 6758, R. C. M. 1921. Cal. Civ. C. Sec. 810. Field Civ. C. Sec. 254.

Collateral References

Ejectment 9(3). 28 C.J.S. Ejectment § 7 et seq.

67-611. (6759) How extinguished. A servitude is extinguished:

- 1. By the vesting of the right to the servitude and the right to the servient tenement in the same person;
 - 2. By the destruction of the servient tenement;
- 3. By the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise; or,
- 4. When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment.

History: En. Sec. 1260, Civ. C. 1895; re-en. Sec. 4517, Rev. C. 1907; re-en. Sec. 6759, R. C. M. 1921. Cal. Civ. C. Sec. 811. Field Civ. C. Sec. 255.

Operation and Effect

Where an irrigation ditch was originally constructed over the public domain by the predecessors of the owner, the latter by virtue of section 2339, Revised Statutes, U. S. C. (Title 30, U. S. C., § 51 and Title 43, U. S. C., § 661), acquired his right to maintain it by grant from the United States and not by enjoyment, and hence his right was not subject to extinguishment by disuse for a period of ten years, as provided by this section, in case of a

servitude acquired by enjoyment. Rodda v. Best, 68 M 205, 214, 217 P 669.

References

Smith v. Denniff, 24 M 20, 25, 60 P 398.

Collateral References

Easements \$\sim 25-32.
28 C.J.S. Easements \$\\$, 28-31, 38-46.
17A Am. Jur. 764, Easements, \$\\$ 159-173.

Abandonment, waiver, or forfeiture of easement on ground of misuse. 16 ALR 2d 609.

Loss of private easement by nonuser. 25 ALR 2d 1275.

CHAPTER 7

RIGHTS INCIDENTAL TO OWNERSHIP OF REAL PROPERTY

Section 67-701. Rights of tenant for life.

67-702. Rights of tenant for years and tenant at will.

67-703. Same.

67-704. Rights of grantees of rents and reversion.

67-705. Assignee of lessee—remedies of lessor against.

67-706. Rights of lessees and their assignees, etc.

67-707. Remedy on leases for life. 67-708. Rent dependent on life.

67-709. Remedy of reversioners, etc.

67-710. Terms of lease may be changed by notice.

67-711. Rights of owner.

67-712. Boundaries by water. 67-713. Boundaries by ways.

67-714. Lateral and subjacent support.

67-715. Trees whose trunks are wholly on land of one.

67-716. Line trees.

67-701. (6760) Rights of tenant for life. The owner of a life estate may use the land in the same manner as the owner of a fee simple, except that he must do no act to the injury of the inheritance.

History: En. Sec. 1270, Civ. C. 1895; re-en. Sec. 4518, Rev. C. 1907; re-en. Sec. 6760, R. C. M. 1921. Cal. Civ. C. Sec. 818. Field Civ. C. Sec. 257.

Operation and Effect

A homestead set apart for the use of a surviving wife constitutes a life estate which may be alienated. Kerlee v. Smith, 46 M 19, 22, 124 P 777.

The right given by this section to the owner of a life estate, to use the land in the same manner as the owner of a fee simple, includes the right of alienation, which is one of the rights inherent in the ownershp of the fee. Kerlee v. Smith, 46 M 19, 22, 124 P 777.

Collateral References

Life Estates € 11. 31 C.J.S. Estates § 37 et seq.

67-702. (6761) Rights of tenant for years and tenant at will. A tenant for years or at will, unless he is a wrongdoer by holding over, may occupy the buildings, take the annual products of the soil, work mines and quarries open at the commencement of his tenancy; and a tenant at will or for an indefinite term may cultivate and harvest the crops growing at the end of his tenancy.

History: En. Sec. 1271, Civ. C. 1895; re-en. Sec. 4519, Rev. C. 1907; re-en. Sec. 6761, R. C. M. 1921. Cal. Civ. C. Sec. 819. Based on Field Civ. C. Sec. 258.

Operation and Effect

Unless a tenant at will becomes a wrongdoer by holding over, he may take the annual products of the soil, and may cultivate and harvest the crops growing at the end of his tenancy, which makes him at all times the owner, as against the landlord, of the crops, whether growing or severed. Power Mercantile Co. v. Moore Mercantile Co., 55 M 401, 410, 177 P 406, distinguished in 121 M 245, 252, 191 P 2d 663.

References

Blodgett Loan Co. v. Hansen, 86 M 406, 409, 284 P 140.

Collateral References

Landlord and Tenant 134-140.

51 C.J.S. Landlord and Tenant § 326 et seq.

67-703. (6762) Same. A tenant for years or at will has no other rights to the property than such as are given to him by the agreement or instrument by which his tenancy is acquired, or by the last section.

History: En. Sec. 1272, Civ. C. 1895; re-en. Sec. 4520, Rev. C. 1907; re-en. Sec. 6762, R. C. M. 1921. Cal. Civ. C. Sec. 820. Field Civ. C. Sec. 259.

Collateral References

Landlord and Tenant 45, 126-170. 51 C.J.S. Landlord and Tenant §§ 236, 238, 239, 297, 327.

67-704. (6763) Rights of grantees of rents and reversion. A person to whom any real property is transferred or devised, upon which rent has been reserved, or to whom any such rent is transferred, is entitled to the same remedies for recovery of rent, for nonperformance of any of the terms of

the lease, or of any waste or cause of forfeiture, as his grantor or devisor might have had.

History: En. Sec. 1273, Civ. C. 1895; re-en. Sec. 4521, Rev. C. 1907; re-en. Sec. 6763, R. C. M. 1921. Cal. Civ. C. Sec. 821. Field Civ. C. Sec. 260.

Operation and Effect

The successor of a landlord has no other

or greater rights than the latter had. Centennial Brewing Co. v. Rouleau, 49 M 490, 504, 143 P 969.

Collateral References

Landlord and Tenant \$≈53(2). 51 C.J.S. Landlord and Tenant \$ 258.

67-705. (6764) Assignee of lessee—remedies of lessor against. Whatever remedies the lessor of any real property has against his immediate lessee for the breach of any agreement in the lease, or for recovery of the possession, he has against the assignees of the lessee, for any cause of action accruing while they are such assignees, except where the assignment is made by way of security for a loan, and is not accompanied by possession of the premises.

History: En. Sec. 1274, Civ. C. 1895; re-en. Sec. 4522, Rev. C. 1907; re-en. Sec. 6764, R. C. M. 1921. Cal. Civ. C. Sec. 822. Based on Field Civ. C. Sec. 261.

Delay Rentals

An assignee of the lessee under an oil and gas lease is bound to pay the delay rentals under this section. Irwin v. Marvel Petroleum Corp., — M —, 365 P 2d 221, 226.

Rights and Liabilities of Assignee

Where one holds as assignee of an oil and gas sublease his rights and liabilities in an action seeking its termination must be determined from it, and not from the original lease to the sublessor, there being neither privity of estate nor privity of contract between him and the lessor; and the provisions of this section, providing that whatever remedies the lessor has against the lessee may be enforced against

an assignee of the lease have no application as between the original lessor and the assignee of the sublease, but do apply as between the assignee and the sublessor. McNamer Realty Co. v. Sunburst Oil & Gas Co., 76 M 332, 346, 247 P 166.

Under an oil and gas lease whatever remedies the lessor has against the lessee may be enforced against an assignee of the lessee. Irwin v. Marvel Petroleum Corp., — M —, 365 P 2d 221, 226.

References

Standard Oil Co. v. Idaho Community Oil Co., 98 M 131, 37 P 2d 660; Conway v. Fabian, 108 M 287, 303, 89 P 2d 1022.

Collateral References

Landlord and Tenant \$579(2), 208, 275. 51 C.J.S. Landlord and Tenant \$4; 52 C.J.S. Landlord and Tenant \$\$717, 718, 720, 728.

67-706. (6765) Rights of lessees and their assignees, etc. Whatever remedies the lessee of any real property may have against his immediate lessor, for the breach of any agreement in the lease, he may have against the assigns of the lessor, and the assigns of the lessee may have against the lessor and his assigns, except upon covenants against encumbrances or relating to the title or possession of the premises.

. History: En. Sec. 1275, Civ. C. 1895; re-en. Sec. 4523, Rev. C. 1907; re-en. Sec. 6765, R. C. M. 1921. Cal. Civ. C. Sec. 823.

References

Standard Oil Co. v. Idaho Community Oil Co., 98 M 131, 37 P 2d 660.

Collateral References

Landlord and Tenant \$79(2).
51 C.J.S. Landlord and Tenant § 44.

67-707. (6766) Remedy on leases for life. Rent due upon a lease for life may be recovered in the same manner as upon a lease for years.

History: En. Sec. 1276, Civ. C. 1895; re-en. Sec. 4524, Rev. C. 1907; re-en. Sec. 6766, R. C. M. 1921. Cal. Civ. C. Sec. 824. Field Civ. C. Sec. 263.

Collateral References

Landlord and Tenant 217(1). 52 C.J.S. Landlord and Tenant § 552.

67-708. (6767) Rent dependent on life. Rent dependent on the life of a person may be recovered after as well as before his death.

History: En. Sec. 1277, Civ. C. 1895; re-en. Sec. 4525, Rev. C. 1907; re-en. Sec. 6767, R. C. M. 1921. Cal. Civ. C. Sec. 825. Field Civ. C. Sec. 264.

Collateral References

:Abatement and Revival \$\sim 53. 1 C.J.S. Abatement and Revival \\$\\$ 137, 159.

67-709. (6768) Remedy of reversioners, etc. A person having an estate in fee, in remainder or reversion, may maintain an action for any injury done to the inheritance, notwithstanding an intervening estate for life or years, and although, after its commission, his estate is transferred, and he has no interest in the property at the commencement of the action.

History: En. Sec. 1278, Civ. C. 1895; re-en. Sec. 4526, Rev. C. 1907; re-en. Sec. 6768, R. C. M. 1921. Cal. Civ. C. Sec. 826. Field Civ. C. Sec. 265.

Collateral References

Abatement and Revival \$\infty\$=41; Remainders \$\infty\$=17(2); Reversions \$\infty\$=8(1).

1 C.J.S. Abatement and Revival § 106; 31 C.J.S. Estates §§ 97 et seq., 111 et seq.

Delivery or distribution to life tenant, or assent by executor to his possession or to the life interest, as inuring to benefit of the remaindermen, so as to make him proper party to bring suit, absent a trust or will provision retaining remainder in estate. 68 ALR 2d 1107.

67-710. (6769) Terms of lease may be changed by notice. In all leases of lands or tenements, or of any interest therein, from month to month, the landlord may, upon giving notice in writing at least fifteen days before the expiration of the month, change the terms of the lease, to take effect at the expiration of the month. The notice, when served upon the tenant, shall of itself operate and be effectual to create and establish, as a part of the lease, the terms, rent, and conditions specified in the notice, if the tenant shall continue to hold the premises after the expiration of the month.

History: En. Sec. 1279, Civ. C. 1895; re-en. Sec. 4527, Rev. C. 1907; re-en. Sec. 6769, R. C. M. 1921. Cal. Civ. C. Sec. 827.

Increase in Rent

A tenant from month to month upon being served with statutory notice of increase in rent upon expiration of the month may deliver up the premises to landlord at expiration of the month, or tenant may hold over and continue in possession, in which event he assents to changed terms, rents and conditions specified in the notice. State ex rel. Needham v. Justice Court, 119 M 89, 171 P 2d 351, 353.

Tenant Holding Over

A tenant must deliver up premises to landlord on termination of lease, and a tenant can hold over rightfully only pursuant to valid agreement with landlord, and tenant may hold over by laches of landlord who at his election may treat tenant as a trespasser or accept him as

a tenant, but a tenant holding over has no election to regard himself as a tenant. State ex rel. Needham v. Justice Court, 119 M 89, 171 P 2d 351, 353.

Where tenant from month to month refused to pay increased rental as required by statutory notice served upon him by landlords, landlords by serving upon tenant three days' notice in writing elected to treat him as a tenant from month to month, and upon being served with such notice tenant had three days in which to pay the rent or to deliver up the premises, and by continuing in possession without paying the rent or delivering up the possession, tenant became guilty of unlawful detainer. State ex rel. Needham v. Justice Court, 119 M 89, 171 P 2d 351, 353.

Collateral References

Landlord and Tenant 33.
51 C.J.S. Landlord and Tenant \$\\$ 195,
229; 52 C.J.S. Landlord and Tenant \$\\$ 503,

67-711. (6770) Rights of owner. The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it.

History: En. Sec. 1290, Civ. C. 1895; re-en. Sec. 4528, Rev. C. 1907; re-en. Sec. 6770, R. C. M. 1921. Cal. Civ. C. Sec. 829. Field Civ. C. Sec. 266.

References

Gas Products Co. v. Rankin, 63 M 372, 389, 207 P 993, 24 ALR 294; Rodda v. Best, 68 M 205, 217, 217 P 669.

Mines and Minerals 47; Property 7. 58 C.J.S. Mines and Minerals § 132 et seq.; 73 C.J.S. Property § 13.

Collateral References

Right of owner of housing development or apartment houses to restrict canvassing, peddling, solicitation of contributions, etc. 3 ALR 2d 1431.

67-712. (6771) Boundaries by water. Except where the grant under which the land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.

History: En. Sec. 1291, Civ. C. 1895; re-en. Sec. 4529, Rev. C. 1907; re-en. Sec. 6771, R. C. M. 1921. Cal. Civ. C. Sec. 830. Based on Field Civ. C. Sec. 267.

Accretions by Dumping

Where lots abutted on river and additional land was formed through dumping by the city, such additional land belonged to the lot owners since their ownership extended to the middle of the stream and such ownership was not cut off by the fact that an alley ran across such land. Missoula v. Bakke, 121 M 534, 198 P 2d 769, 772.

Ejectment by Riparian Owner

The boundary of land on a nontidal navigable river, whenever another intent is not expressed, extends to the ordinary low-water mark, and ejectment will lie at the suit of a riparian owner on a navigable stream to recover the possession of land between high and low-water mark from one who is in possession thereof not claiming rights as a navigator or fisherman. Gibson v. Kelly, 15 M 417, 422, 39 P 517.

Large Excess of Land Left between Shore and Meander Line When Surveyed, Remains Public Domain

Where shown in condemnation action by United States that lands in question were in place when survey made, and large body of unsurveyed land in controversy lay between meander line and low-water mark of Missouri river, such lands (and accretions thereto) remained and continued to be public domain, and where river subsequently changed its

channel when ice broke up in spring by cutting across an ox-bow loop, under section 67-302, the abandoned bed belonged to the state of Montana. United States v. Eldredge, 33 F Supp 337, 341.

Meander Lines

Meander lines run in surveying public lands bordering upon navigable bodies of water are run for the purpose of ascertaining the quantity of land for which the government requires payment; they are not boundary lines and title of the grantee is not limited to such lines but extends to the edge of the lake or stream at low-water mark, the water itself constituting the real boundary. Faucett v. Dewey Lumber Co., 82 M 250, 258, 266 P

Pleading in Eminent Domain

A complaint in a condemnation suit which described the land by metes and bounds on three sides, and on the fourth merely designated a navigable river as the boundary, without stating that by the latter description the high or low-water mark was meant, was sufficient to meet the requirements of this section. Interstate Power Co. v. Anaconda Copper Min. Co., 52 M 509, 513, 159 P 408.

References

Herrin v. Sutherland, 74 M 587, 595, 241 P 328, 42 ALR 937.

Collateral References

Navigable Waters 36, 37; Waters and Water Courses 89-94, 109-113.
65 C.J.S. Navigable Waters §§ 88, 94;

93 C.J.S. Waters §§ 5 et seq., 103 et seq.

67-713. (6772) Boundaries by ways. An owner of land bounded by a road or street is presumed to own to the center thereof, but the contrary may be shown.

History: En. Sec. 1292, Civ. C. 1895; re-en. Sec. 4530, Rev. C. 1907; re-en. Sec. 6772, R. C. M. 1921. Cal. Civ. C. Sec. 831. Field Civ. C. Sec. 268.

Deed Not Rebutting Presumption

Fact that deed described boundary as "following the south side of said county road" did not rebut presumption that owner of land owned to the center of the road. McPherson v. Monegan, 120 M 454, 187 P 2d 542, 543.

Collateral References

Boundaries 19-23. 11 C.J.S. Boundaries §§ 35-37, 39, 43-45.

67-714. (6773) Lateral and subjacent support. Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for the purposes of construction, on using ordinary care and skill, and taking reasonable precautions to sustain the land of the other, and giving previous reasonable notice to the other of his intention to make such excavations.

History: En. Sec. 1293, Civ. C. 1895; re-en. Sec. 4531, Rev. C. 1907; re-en. Sec. 6773, R. C. M. 1921. Cal. Civ. C. Sec. 832. Based on Field Civ. C. Sec. 269.

Liability of Lessor of Mining Claim

Whether lessor of mining claim can be held liable for damages caused by lessee of mining claim failing to furnish proper subjacent and lateral support depends on the terms of the lease agreement. Butte Copper & Z. Co. v. Poague, 164 F 2d 201, 204, cert. den. 333 U S 843, 92 L Ed 1127, 68 S Ct 661.

Manner of Giving Notice

The notice required by this section to be given by a lot owner to an adjoining owner of his intention to make excavations, in the absence of a specific provision as to the manner in which it is to be given, may be served in a way best calculated to bring the matter to his attention, and where such a notice in writing

was left at the adjoining owner's home for delivery to him on his return to the city on the day the excavation was commenced, it was sufficient. Neyman v. Pincus, 82 M 467, 487 et seq., 267 P 805.

Notice to Tenants

This section provides for notice to the adjoining owner only, and therefore notice to his tenants is not required. Neyman v. Pincus, 82 M 467, 487 et seq., 267 P 805.

Collateral References

Adjoining Landowners \$\sim 2-4, 6. 2 C.J.S. Adjoining Landowners \$\\$ 4, 5, 7-10, 16, 19-25, 28-32.

1 Am. Jur. 519, Adjoining Landowners, §§ 21-48.

Liability of employer for injury to adjoining realty resulting from excavation work by independent contractor on his premises. 33 ALR 2d 111.

67-715. (6774) Trees whose trunks are wholly on land of one. Trees whose trunks stand wholly upon the land of one owner belong exclusively to him, although their roots grow into the land of another.

History: En. Sec. 1294, Civ. C. 1895; re-en. Sec. 4532, Rev. C. 1907; re-en. Sec. 6774, R. C. M. 1921. Cal. Civ. C. Sec. 833. Field Civ. C. Sec. 270.

Collateral References

Adjoining Landowners 5.

2 C.J.S. Adjoining Landowners \$\$ 37-40.

1 Am. Jur. 536, Adjoining Landowners, \$\$ 55-59.

67-716. (6775) Line trees. Trees whose trunks stand partly on the land of two or more coterminous owners belong to them in common.

History: En. Sec. 1295, Civ. C. 1895; 6775, R. C. M. 1921. Cal. Civ. C. Sec. 834. re-en. Sec. 4533, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 271.

CHAPTER 8

OBLIGATIONS INCIDENTAL TO THE OWNERSHIP OF REAL PROPERTY
—MONUMENTS AND FENCES

Section 67-801. Duties of tenant for life.

67-802. Monuments and fences.

67-803. Partition fences.

67-804. Partition fences to be maintained at joint expense,

67-805. Fence when joint occupancy ceases. 67-806. When partition fence removed.

67-807. Repairs of partition fences.

67-801. (6776) Duties of tenant for life. The owner of a life estate must keep the buildings and fences in repair from ordinary waste, and must pay the taxes and other annual charges, and a just proportion of extraordinary assessments benefiting the whole inheritance.

History: En. Sec. 1300, Civ. C. 1895; re-en. Sec. 4534, Rev. C. 1907; re-en. Sec. 6776, R. C. M. 1921. Cal. Civ. C. Sec. 840. Field Civ. C. Sec. 272.

Improvements

The cost of installation of a sidewalk and steps, and painting done at the request of the life tenant at a private dwelling, occupied by her, should be paid from the income of the life tenant and not out of corpus or estate funds. In re Lindhardt's Estate, 133 M 65, 320 P 2d 357, 362.

Improvements made by an executor pursuant to some ordinance or statute, or improvements where the property was in an untenantable condition should be charged to the corpus of the estate. In re Lindhardt's Estate, 133 M 65, 320 P 2d 357, 364.

Insurance

Fire insurance on buildings and insurance on an automobile taken out by the executor in favor of the estate was properly chargeable against the corpus rather than income. In re Lindhardt's Estate, 133 M 65, 320 P 2d 357, 364.

Payment of Taxes

The requirement that the owner of life

estate pay the taxes refers to entire tax on land itself. Rist v. Toole County, 117 M 426, 440, 159 P 2d 340, 162 ALR 406.

Repairs

Ordinary repairs on business property, such as repairs on a furnace, a new door and a lock should have been paid out of income since the duty to pay was on the life tenant; however, repairs normally charged off over more than one accounting period, such as new roofs, a new sidewalk, and repairing the interior in connection with business property should be paid for by charging the initial expense to the estate funds, and then allocating a portion from each year's income to be deducted and paid back into the corpus. In re Lindhardt's Estate, 133 M 65, 320 P 2d 357, 362.

References

Anderson v. McClenathan, 62 M 387, 389, 205 P 230; Kelly v. Grainey, 113 M 520, 528, 129 P 2d 619; In re Daily's Estate, 117 M 194, 207, 159 P 2d 327.

Collateral References

Life Estates 5, 16-20. 31 C.J.S. Estates § 37 et seq.

67-802. (6777) **Monuments and fences.** Coterminous owners are mutually bound equally to maintain:

1. The boundaries and monuments between them;

2. The fences between them, unless one of them chooses to let his land lie without fencing, in which case, if he afterwards incloses it, he must refund to the other a just proportion of the value, at that time, of any division fence made by the latter; provided, however, that using land for grazing or pasturage of any kind whatsoever shall be deemed a usage of said land, and such land shall not be considered as lying idle under the provisions of this section.

History: En. Sec. 1301, Civ. C. 1895; re-en. Sec. 4535, Rev. C. 1907; amd. Sec. 1, Ch. 132, L. 1917; re-en. Sec. 6777, R. C. M. 1921. Cal. Civ. C. Sec. 841. Based on Field Civ. C. Sec. 273.

Construction without Agreement

In boundary dispute, fence constructed by defendant as a stock barrier, without any agreement to fix boundary line, was not the true line as against line established by plaintiffs' surveyor. Tillinger v. Frisbie, 132 M 583, 318 P 2d 1079, 1081, 1083, distinguished in 133 M 461, 325 P 2d 914.

Division Fence

This section contemplates that the fence shall lie one-half on the land of each owner, each contributing his share to its erection and maintenance, and the ground upon which it stands; and thus the fence may stand on the land of each without any agreement. Hoar v. Hennessy, 29 M 253, 259, 74 P 452.

A division fence erected on a boundary line agreed upon between adjoining properties is properly erected. Hoar v. Hennessy, 29 M 253, 259, 74 P 452.

Under this section, coterminous land owners are mutually bound equally to maintain a division fence; each must contribute his share of the land, material and labor for its erection and maintenance. Schmuck v. Beck, 72 M 606, 616, 234 P 477.

Where two properties are divided by a fence which both owners suppose to be on the line, such fence is a division fence, as between them, until the true line is ascertained, when they must conform to the true line. Schmuck v. Beck, 72 M 606, 616, 234 P 477, distinguished in 133 M 461, 464, 325 P 2d 914.

When one adjoining land owner neglects or refuses to erect his portion of a division fence, and the other erects the whole thereof with knowledge of the owner of the adjoining land and, while intending to erect it on the line, by mistake erects it on the land of the other, he may on discovery of his mistake remove the fence without subjecting himself to an action for trespass or for material. Schmuck v. Beck, 72 M 606, 616, 234 P 477.

References

Briggeman v. Corrigan, 60 M 205, 208, 198 P 443; Dorman v. Erie, 63 M 579, 583, 208 P 908.

Collateral References

Adjoining Landowners 1; Fences 1-10.

2 C.J.S. Adjoining Landowners §§ 1-3, 26, 27; 36A C.J.S. Fences §§ 2-4. 22 Am. Jur. 522, Fences, §§ 11 et seq.

Store and import of town (owner) in

Scope and import of term "owner" in statutes relating to fences. 2 ALR 778 and 95 ALR 1085.

Constitutionality of laws relating to fences. 6 ALR 212 and 18 ALR 67.

67-803. (6778) Partition fences. The occupants of adjoining lands inclosed with fences must build and maintain partition fences between their own and the next adjoining inclosure in equal shares, so long as both continue to inclose the same; and such partition fence must be kept in good repair throughout the year, unless the occupants otherwise mutually agree.

History: Ap. p. Sec. 1114, 5th Div. Comp. Stat. 1887; amd. Sec. 3253, Pol. C. 1895; re-en. Sec. 2085, Rev. C. 1907; re-en. Sec. 6778, R. C. M. 1921.

References

Briggeman v. Corrigan, 60 M 205, 207, 208, 198 P 443; Dorman v. Erie, 63 M 579, 583, 208 P 908.

Collateral References

Fences 5-10.
36A C.J.S. Fences § 5-9.
22 Am. Jur. 528, Fences, § 20 et seq.

67-804. (6779) Partition fences to be maintained at joint expense. If any occupant of land adjoining the inclosure of another inclose the same, upon the inclosure of such other person, he must, within three months thereafter, build his proportion of such partition fence, or refund to the owner thereof an equal proportion of the value, at that time, of any partition fence of such adjoining occupant.

History: En. Sec. 1115, 5th Div. Comp. Stat. 1887; re-en. Sec. 3254, Pol. C. 1895; re-en. Sec. 2086, Rev. C. 1907; re-en. Sec. 6779, R. C. M. 1921.

References

Briggeman v. Corrigan, 60 M 205, 207, 208, 198 P 443; Dorman v. Erie, 63 M 579, 583, 208 P 908.

Collateral References

22 Am. Jur. 522, Fences, §§ 11 et seq.

67-805. (6780) Fence when joint occupancy ceases. Whenever any lands belonging to different persons in severalty have been inclosed and occupied in common, or without a partition fence between them, and one of such occupants desires to occupy his part in severalty, the other occupant

must, within six months after being notified in writing, build and maintain his proportion of such partition fence as may be necessary for that purpose, and in case of neglect or refusal so to do, the person giving such notice may build such fence at the expense of the person so neglecting or refusing, the amount expended to be recovered in an action, together with all damages he may sustain on account of such neglect or refusal.

History: En. Sec. 1116, 5th Div. Comp. Stat. 1887; re-en. Sec. 3255, Pol. C. 1895; re-en. Sec. 2087, Rev. C. 1907; re-en. Sec. 6780, R. C. M. 1921.

References

Briggeman v. Corrigan, 60 M 205, 207, 209, 198 P 443.

67-806. (6781) When partition fence removed. If the occupants of adjoining lands have heretofore built or hereafter build their respective portions of a partition fence, and either of them at any time desires to suffer the land occupied by him to lie open, he may, after having given to the occupants of the adjoining land at least six months' notice of his intention so to do, remove his proportion of the partition fence, unless such adjoining occupant pays or tenders to him the value thereof; and if such fence be removed without notice, or after payment or tender of the value as aforesaid, the person removing the same is liable to the person injured for all damages he may sustain thereby.

History: En. Sec. 1117, 5th Div. Comp. Stat. 1887; re-en. Sec. 3256, Pol. C. 1895; re-en. Sec. 2088, Rev. C. 1907; re-en. Sec. 6781, R. C. M. 1921.

Removal of Line Fence

Absent agreement, a line fence may be removed by either owner only after six months notice to the other. Thompson v. Mattuschek, 134 M 500, 333 P 2d 1022, 1026.

In action to restrain trespass by livestock and to recover for partial loss of a growing barley crop then being trampled and grazed down by livestock after defendant had removed a long-standing section line fence bounding one side of a field which plaintiff had just planted to barley, complaint alleging a malicious removal of the fence was sufficient to state a cause of action for trespass of cattle upon plaintiff's property although he did not allege a secure enclosure of the barley field but did so testify. Thompson v. Mattuschek, 134 M 500, 333 P 2d 1022, 1026.

Collateral References

Fences 26, 27. 36A C.J.S. Fences §§ 16, 17. 22 Am. Jur. 537, Fences, §§ 32 et seq.

67-807. (6782) Repairs of partition fences. In case any person neglects or refuses to repair or rebuild any partition fence which by law he ought to build or maintain, the occupant of the adjoining land may, after giving sixty days' notice that a new fence should be erected, or five days' notice in writing that the repairing of such fence is necessary, build or repair such fence at the expense of the party so neglecting or refusing, the amount so expended to be recovered from him; and the party so neglecting or refusing, after receipt by him of the notice above provided, is liable to the party injured for all damages he may sustain thereby.

History: En. Sec. 1118, 5th Div. Comp. Stat. 1887; re-en. Sec. 3257, Pol. C. 1895; re-en. Sec. 2089, Rev. C. 1907; re-en. Sec. 6782, R. C. M. 1921.

Collateral References

22 Am. Jur. 523, Fences, § 13.

CHAPTER 9

POWERS IN RELATION TO REAL PROPERTY

Section 67-901. Definition. 67-902. Who to execute powers.

PROPERTY

67-903. Married women.

67-904. Same.

67-905. How executed.

67-901. (6798) **Definition**. A power, as the term is used in this chapter, is an authority to do some act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner granting or reserving such power might himself perform for any purpose.

History: En. Sec. 1330, Civ. C. 1895; re-en. Sec. 4551, Rev. C. 1907; re-en. Sec. 6798, R. C. M. 1921. Field Civ. C. Sec. 302.

Collateral References

Powers 2.

72 C.J.S. Powers § 1 et seq. Generally, see 41 Am. Jur. 803, Powers.

(6799) Who to execute powers. A power cannot be executed by any person not capable of disposing of real property.

History: En. Sec. 1331, Civ. C. 1895; re-en. Sec. 4552, Rev. C. 1907; re-en. Sec. 6799, R. C. M. 1921. Field Civ. C. Sec. 319.

67-903. (6800) Married women. A married woman may execute a power during her marriage, without the concurrence of her husband, unless otherwise prescribed by the terms of the power.

History: En. Sec. 1332, Civ. C. 1895; re-en. Sec. 4553, Rev. C. 1907; re-en. Sec. 6800, R. C. M. 1921. Field Civ. C. Sec. 320.

Collateral References

Husband and Wife 55; Powers 30. 41 C.J.S. Husband and Wife §§ 6, 165, 166, 175; 72 C.J.S. Powers § 35.

67-904. (6801) Same. No power can be executed by a married woman before she attains her majority.

History: En. Sec. 1333, Civ. C. 1895; re-en. Sec. 4554, Rev. C. 1907; re-en. Sec. 6801, R. C. M. 1921. Based on Field Civ. C. Sec. 321.

Collateral References

Infants 2: Powers 30. 43 C.J.S. Infants §§ 19, 25; 72 C.J.S. Powers § 35.

67-905. (6802) **How executed**. A power can be executed only by a written instrument which would be sufficient to pass the estate or interest intended to pass under the power, if the person executing the power was the actual owner.

History: En. Sec. 1334, Civ. C. 1895; re-en. Sec. 4555, Rev. C. 1907; re-en. Sec. 6802, R. C. M. 1921. Field Civ. C. Sec. 322.

Collateral References

Powers 32-34. 72 C.J.S. Powers § 38.

CHAPTER 10

ALIEN LAND LAW

(Unconstitutional—State v. Oakland, 129 M 347, 287 P 2d 39, 42)

67-1001 to 67-1008. (6802.1 to 6802.8) **Unconstitutional.**

Unconstitutional

The Alien Land Law, comprising sections 67-1001 to 67-1008 (Secs. 1 to 8, Ch. 58, L. 1923), is unconstitutional and void as being in contravention of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. State v. Oakland, 129 M 347, 287 P 2d 39, 42.

CHAPTER 11

PERSONAL PROPERTY—KINDS—LAW GOVERNING

Section 67-1101. By what law governed.

67-1102. Things in action defined. 67-1103.

Transfer and survivorship.

How far the subject of ownership. 67-1104.

Joint authorship. 67-1105.

67-1106. Transfer.

67-1107. Effect of publication.

67-1108. Subsequent inventor, author, etc.

67-1109. Private writings.

67-1110. Trade-marks and signs.

67-1111. Good will of business.

67-1112. Good will transferable.

67-1113. Title deeds.

67-1101. (6803) By what law governed. If there is no law to the contrary, in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile.

History: En. Sec. 1340, Civ. C. 1895; re-en. Sec. 4556, Rev. C. 1907; re-en. Sec. 6803, R. C. M. 1921. Cal. Civ. C. Sec. 946. Field Civ. C. Sec. 364.

Collateral References

Property 56.

73 C.J.S. Property § 12.

Conflict of laws as to disposition of and relative rights to bank deposits in the names of more than one person. 25 ALR 2d 1240.

Conflict of laws and related problems as to equitable conversion of property, 43 ALR 2d 569.

67-1102. (6804) Things in action defined. A thing in action is a right to recover money or other personal property by a judicial proceeding.

History: En. Sec. 1350, Civ. C. 1895; re-en. Sec. 4557, Rev. C. 1907; re-en. Sec. 6804, R. C. M. 1921. Cal. Civ. C. Sec. 953. Based on Field Civ. C. Sec. 366.

Assignment of Thing in Action

Transaction between plaintiffs and defendants held to amount to an assignment of a chose in action, and that judgment for plaintiff was proper. Parnell v. Davenport, 36 M 571, 573, 93 P 939.

Execution against Cause of Action

A cause of action is the right which a party has to institute a judicial proceeding, and if the relief sought is the recovery of money, the cause of action is designated a "thing" or "chose in action," which is personal property and therefore subject to seizure and sale in satisfaction of a judgment. State ex rel. Coffey v. District Court, 74 M 355, 358, 240 P 667.

Tort Claim for Personal Injuries Not "Thing in Action"

A cause of action for personal injuries is not a "thing in action" or "chose in action" and is not subject to levy of garnishment. (State ex rel. Coffey v. District Court, supra, distinguished.) Coty v. Cogswell, 100 M 496, 501, 50 P 2d 249.

Collateral References

Action \$\infty\$1. 1 C.J.S. Actions §§ 1, 8, 15. 42 Am. Jur. 207, Property, § 26.

67-1103. (6805) Transfer and survivorship. A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except where, in the cases provided in Title 93, it passes to his devisees or successor in office.

History: En. Sec. 1351, Civ. C. 1895; re-en. Sec. 4558, Rev. C. 1907; re-en. Sec. 6805, R. C. M. 1921. Cal. Civ. C. Sec. 954. Field Civ. C. Sec. 367.

Claim against Federal Government

Insurance company, subrogated to rights of insured upon payment of claim, had no right to sue under Federal Tort Claims

Act (U.S.C., Tit. 28, § 931) since United States Code, Tit. 31, sec. 203 prohibits the assignments of claims against United States. Cascade County v. United States, 75 F Supp 850, 852.

Oral Assignment

Things in action, or rights arising out of obligations, are assignable as a general rule, nonassignability being the exception, and the transfer may be made without writing whenever a writing is not expressly required by statute. Flinner v. McVay, 37 M 306, 313, 96 P 340. See Winslow v. Dundom, 46 M 71, 82, 125 P 136.

Subrogation to Insurance Company

The right to recover damages with interest for the negligent destruction of

property by fire is assignable, and passes by subrogation to an insurance company to the extent of the proportion of the loss paid by it to the owner of the property destroyed. Caledonia Ins. Co. v. Northern Pacific Ry. Co., 32 M 46, 49, 79 P 544. See Gaugler v. Chicago M. & P. S. Ry. Co., 197 Fed 79, 83.

References

Parnell v. Davenport, 36 M 571, 573, 93 P 939.

Collateral References

Assignments 21-27; Executors and Administrators 48-52.

6 C.J.S. Assignments §§ 30-35; 33 C.J.S. Executors and Administrators §§ 100-102.

67-1104. (6806) How far the subject of ownership. The author of any product of the mind, whether it is an invention, or a composition in letters or art, or a design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the product and the representations or expressions thereof made by him remain in his possession.

History: En. Sec. 1360, Civ. C. 1895; re-en. Sec. 4559, Rev. C. 1907; re-en. Sec. 6806, R. C. M. 1921, Cal. Civ. C. Sec. 980. Field Civ. C. Sec. 429.

Collateral References

Literary Property 2-1-3.

18 C.J.S. Copyright and Literary Property § 1 et seq.

Generally, see 34 Am. Jur. 397, Literary Property and Copyright.

Literary and artistic rights for purposes of, and their infringement by or in connection with, motion pictures, radio, and television. 23 ALR 2d 244.

- **67-1105.** (6807) **Joint authorship.** Unless otherwise agreed, a product of the mind in the production of which several persons are jointly concerned, is owned by them as follows:
 - 1. If the product is single, in equal proportions.
 - 2. If it is not single, in proportion to the contribution of each.

History: En. Sec. 1361, Civ. C. 1895; 6807, R. C. M. 1921, Cal. Civ. C. Sec. 981, re-en. Sec. 4560, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 430.

67-1106. (6808) **Transfer**. The owner of any product of the mind, or of any representation or expression thereof, may transfer his property in the same.

History: En. Sec. 1362, Civ. C. 1895; re-en. Sec. 4561, Rev. C. 1907; re-en. Sec. 6808, R. C. M. 1921. Cal. Civ. C. Sec. 982. Field Civ. C. Sec. 431.

Collateral References

Literary Property € 6. 18 C.J.S. Copyright and Literary Property § 12.

67-1107. (6809) Effect of publication. If the owner of a product of the mind intentionally makes it public, a copy or reproduction may be made public by any person, without responsibility to the owner, so far as the law of this state is concerned.

History: En. Sec. 1363, Civ. C. 1895; 6809, R. C. M. 1921, Cal. Civ. C. Sec. 983. re-en. Sec. 4562, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 432.

Collateral References

Literary Property 5 5 18 C.J.S. Copyright and Literary Property § 14.

Literary and artistic rights for purposes of motion pictures, radio, and television as affected by publication. 23 ALR 2d 244.

67-1108. (6810) Subsequent inventor, author, etc. If the owner of a product of the mind does not make it public, any other person subsequently and originally producing the same thing has the same right therein as the prior author, which is exclusive to the same extent against all persons except the prior author, or those claiming under him.

History: En. Sec. 1364, Civ. C. 1895; re-en. Sec. 4563, Rev. C. 1907; re-en. Sec. 6810, R. C. M. 1921. Cal. Civ. C. Sec. 984. Field Civ. C. Sec. 433.

Collateral References

Literary Property \$\infty 3, 4, 8.

18 C.J.S. Copyright and Literary Property \(\xi \) 4 et seq.

67-1109. (6811) Private writings. Letters and other private communications in writing belong to the person to whom they are addressed and delivered; but they cannot be published against the will of the writer, except by authority of law.

History: En. Sec. 1365, Civ. C. 1895; re-en. Sec. 4564, Rev. C. 1907; re-en. Sec. 6811, R. C. M. 1921, Cal. Civ. C. Sec. 985. Field Civ. C. Sec. 434.

Collateral References

Generally, see 41 Am. Jur. 923, Privacy.

67-1110. (6812) Trade-marks and signs. One who produces or deals in a particular thing, or conducts a particular business, may appropriate to his exclusive use, as a trade-mark, any form, symbol, or name which has not been so appropriated by another, to designate the origin or ownership thereof; but he cannot exclusively appropriate any designation, or part of a designation, which relates only to the name, quality, or the description of the thing or business, or the place where the thing is produced, or the business is carried on.

History: En. Sec. 1370, Civ. C. 1895; re-en. Sec. 4565, Rev. C. 1907; re-en. Sec. 6812, R. C. M. 1921. Cal. Civ. C. Sec. 991. Based on Field Civ. C. Sec. 435.

Collateral References

Trade-Marks and Trade-Names and Unfair Competition \$\sim 1-9\$.

87 C.J.S. Trade-Marks, Trade-Names, and Unfair Competition § 21.

52 Am. Jur. 501, Trademarks, Tradenames and Trade Practices.

Protection, as trade-mark, of union label, shop card, or other insignia denoting union shop or workmanship. 42 ALR 2d 718.

67-1111. (6813) Good will of business. The good will of a business is the expectation of continued public patronage, but it does not include a right to use the name of any person from whom it was acquired.

History: En. Sec. 1371, Civ. C. 1895; re-en. Sec. 4566, Rev. C. 1907; re-en. Sec. 6813, R. C. M. 1921. Cal. Civ. C. Sec. 992. Field Civ. C. Sec. 436.

Good Will Intangible

The good will of a business is intangible. Esselstyn v. Holmes, 42 M 507, 516, 114 P 118.

Owner Entitled to Protection in Exclusive Enjoyment

Good will, although intangible, is property capable of transfer, and the owner

is entitled to the same protection in the exclusive enjoyment of it as he is in that of his tangible possessions. Held, in an action on infringement of trade-mark, for injunction and damages, that one competitor in the same business cannot so dress his goods or advertise them as to take away the trade reputation which another has established by a long course of honesty and fair dealing with the public. Truzzolino Food Products Co. v. F. W. Woolworth Co., 108 M 408, 415, 91 P 2d 415, overruled on another point in 123 M 228, 239, 211 P 2d 420.

References

Wylie v. Wylie P. C. Co., 57 M 115-118, 187 P 279.

Collateral References

Good Will€ 1, 2.

38 C.J.S. Good Will §§ 1, 3, 4. 24 Am. Jur. 801, Good Will.

Good will as included in "book value" in partnership agreement in determining value of partner's interest. 47 ALR 2d 1429.

67-1112. (6814) **Good will transferable.** The good will of a business is property, transferable like any other.

History: En. Sec. 1372, Civ. C. 1895; re-en. Sec. 4567, Rev. C. 1907; re-en. Sec. 6814, R. C. M. 1921, Cal. Civ. C. Sec. 993. Field Civ. C. Sec. 437.

Operation and Effect

Where a debtor transferred his stock of goods by an itemized bill of sale, which did not include the good will of the business, evidence as to the value of the good will was inadmissible on an issue of fraud toward creditors in the conveyance. Yoder v. Reynolds, 28 M 183, 193, 72 P 417.

Although the good will of a business is intangible, it is property capable of trans-

fer, and the owner thereof is entitled to the same protection in its exclusive enjoyment as he is in that of his tangible possessions. Esselstyn v. Holmes, 42 M 507, 516, 114 P 118.

References

Wylie v. Wylie P. C. Co., 57 M 115-118, 187 P 279; Truzzolino Food Products Co. v. F. W. Woolworth Co., 108 M 408, 415, 91 P 2d 415.

Collateral References

Good Will 5 4-6. 38 C.J.S. Good Will §§ 3, 7, 8, 10. 24 Am. Jur. 809, Good Will, §§ 12-24.

67-1113. (6815) Title deeds. Instruments essential to the title of real property, and which are not kept in a public office as a record pursuant to law, belong to the person in whom, for the time being, such title may be vested, and pass with the title.

History: En. Sec. 1373, Civ. C. 1895; re-en. Sec. 4568, Rev. C. 1907; re-en. Sec. 6815, R. C. M. 1921. Cal. Civ. C. Sec. 994. Field Civ. C. Sec. 438.

References

Cook v. Rigney, 113 M 198, 202, 126 P 2d 325.

Collateral References

Property \$7. 73 C.J.S. Property § 13.

CHAPTER 12

ACQUISITION OF PROPERTY BY OCCUPANCY

Section 67-1201. Property—how acquired.

67-1202. Simple occupancy.

67-1203. Prescription.

67-1201. (6816) Property—how acquired. Property is acquired by:

- 1. Occupancy;
- 2. Accession;
- 3. Transfer;
- 4. Will; or,
- 5. Succession.

History: En. Sec. 1380, Civ. C. 1895; re-en. Sec. 4569, Rev. C. 1907; re-en. Sec. 6816, R. C. M. 1921. Cal. Civ. C. Sec. 1000.

References

Hoppin v. Lang, 74 M 558, 562, 241 P 636; In re Nossen's Estate, 118 M 40, 162

P 2d 216, 217; Baird v. Baird, 125 M 122,

Collateral References

232 P 2d 348, 356.

Property, and other particular topics.
73 C.J.S. Property § 15.

67-1202. (6817) **Simple occupancy.** Occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession.

History: En. Sec. 1390, Civ. C. 1895; re-en. Sec. 4570, Rev. C. 1907; re-en. Sec. 6817, R. C. M. 1921. Cal. Civ. C. Sec. 1006. Field Civ. C. Sec. 440.

Undisturbed Possession of Water Right

The undisturbed possession of a water right (which is property) for a period of time in excess of the time necessary to acquire title by prescription, standing

alone, is sufficient to vest clear title in the one having possession, under this section. Cook v. Hudson, 110 M 263, 281, 103 P 2d 137.

Collateral References

Adverse Possession

2 C.J.S. Adverse Possession §§ 163, 164, 207.

67-1203. (6818) **Prescription**. Occupancy for the period prescribed by Title 93 as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all.

History: En. Sec. 1391, Civ. C. 1895; re-en. Sec. 4571, Rev. C. 1907; re-en. Sec. 6818, R. C. M. 1921. Cal. Civ. C. Sec. 1007. Field Civ. C. Sec. 441.

Cross-References

Adverse possession, secs. 93-2506 to 93-2514.

Limitation of actions concerning real property, sec. 93-2501.

Applies to Easements

The title to an easement, though acquired by prescription, is as effective as though it had been evidenced by deed. Babcock v. Gregg, 55 M 317, 322, 478 P 284.

This section, defining "title by prescription," applies to an easement in real property as well as to the fee. Groshean v. Dillmont Realty Co., 92 M 227, 240, 12 P 2d 273.

Change from Permissive to Hostile Possession

Possession of real property by permission of the owner and with knowledge of title in him cannot be made the basis of a title by prescription, and though permissive possession may subsequently become hostile, to make it so there must be a repudiation of the permissive possession and of the recognition of ownership implicit therein, and the repudiation must be brought home to the owner by actual notice, or at least by acts of hostility, so manifest and notorious that actual notice must be presumed. Kelly v. Grainey, 113 M 520, 529, 129 P 2d 619.

While a permissive possession may subsequently become hostile, to make it so there must have been a repudiation of the permissive possession brought home to the owner by actual notice. "Hostile" possession, within this rule, means an invasion of the owner's possession by the

claimant without the owner's permission and in violation of the latter's right of property; "adverse" possession means having opposing interests; having interests for the preservation of which opposition is essential. Price v. Western Life Ins. Co., 115 M 509, 513, 146 P 2d 165.

Continuous Use

Adverse user of an irrigating ditch whenever use of it was necessary, uninterrupted by the owner of the servient estate, was continuous and uninterrupted, continuous use not necessarily implying constant use and continuity of use depending altogether upon the nature and character of the right claimed. Hays v. De Atley, 65 M 558, 562, 212 P 296.

Ditch Right

Title by prescription to a ditch conveying water may be obtained by use thereof whenever water is needed. Te Selle v. Storey, 133 M 1, 319 P 2d 218, 220.

Where deed to defendant after describing property by legal subdivisions contained clause: "Together with all the tenements, hereditaments and appurtenances, water rights and water ditches to the same belonging," if defendant's predecessor used the ditch for more than ten years there was title in him by prescription which passed to defendant by deed and it was of no consequence that the deed did not specifically mention the ditch right as an appurtenance. Te Selle v. Storey, 133 M 1, 319 P 2d 218, 220.

Elements

If a defendant in ejectment proves adverse possession, in himself and in his predecessor, for the required statutory period, he shows a title absolutely in himself to the disputed land. Rude v. Marshall, 54 M 27, 30, 166 P 298.

The occupancy of land for the period of ten years which under this section ripens into title by prescription must be such as will constitute adverse possession, i.e., actual, visible, hostile and continuous possession for the full period; the claim of the possessor must invade the title of the owner and be so brought home to him that he is in a position to institute action for possession at all times during the entire ten-year period; otherwise the possession is deemed to have been under and in subordination to the legal title. Ferguson v. Standley, 89 M 489, 499, 300 P 245.

Mere possession of real property, no matter how exclusive and complete, is not sufficient to create a title by prescription; to create such a title the possession must have been adverse; otherwise it will be deemed to have been in subordination to the legal title. Le Vasseur v. Roullman, 93 M 552, 556, 20 P 2d 250.

The possession of realty, to be "adverse," must be actual and visible, exclusive, hostile and continued for a period of ten years; it must be open and notorious, or be of such a character as to raise a presumption of notice, or so patent that the owner could not be deceived; the claim of the possessor must be so brought home to the owner as to enable the latter to institute action for possession at all times during the running of the statute of limitations. Le Vasseur v. Roullman, 93 M 552, 556, 20 P 2d 250.

Exclusive Use

The fact that plaintiff in his complaint claimed the right to use the ditch to the extent of one-half of its capacity only, conceding to defendants the right to use the other half, did not have the effect of destroying his allegation that his use was exclusive, the word "exclusive" in such a case meaning, not that others had no rights in it, but that his right to its use was not dependent on the like right in others and that their use did not interfere with his. Hays v. De Atley, 65 M 558, 562, 212 P 296.

This section authorizes acquisition of title by prescription to an easement, such title being as effective as though evidenced by a deed; the occupancy of the land in such a case does not divest the servient owner of title to the land over which it extends and need be continuous only in the same sense that the claimant exercise his right without interference at such times as he has need of the use; it need not be exclusive so long as the right does not depend upon a like right in others. Ferguson v. Standley, 89 M 489, 499, 300 P 245.

Nature of Title

The title to an easement acquired by prescription is as effective as though evidenced by a deed. Stetson v. Youngquist, 76 M 600, 606, 248 P 196. See also Groshean v. Dillmont Realty Co., 92 M 227, 240, 12 P 2d 273.

A title by prescription is as effective as though evidenced by a deed. Te Selle v. Storey, 133 M 1, 319 P 2d 218, 220.

Pleading

In an action to quiet title to an easement by prescription in a ditch across defendants' land, the complaint alleging, inter alia, that plaintiff's possession had for more than ten years been continuous and exclusive was sufficient as against the objection that it was defective in not alleging that it was also peaceable, the words "continuous and exclusive" comprehending the meaning of "peaceable." Hays v. De Atley, 65 M 558, 562, 212 P 296.

One claiming a ditch right over another's land by adverse user must not only be able to show an open, notorious, exclusive and hostile possession of the easement claimed but also that his possession was continued and uninterrupted for the full statutory period of ten years; if possession be broken it ceases to be effectual, since, as soon as a break occurs, the law restores the constructive possession of the owner. Scott v. Jardine Gold Min. & Mill. Co., 79 M 485, 493, 257 P 406.

Prescription to Establish Highway

This section appears to recognize the doctrine that adverse use by the public for the period named in the statute of limitations will establish a highway by prescription, but the title will be confined to the very way traveled during the period, unless an attempt has been made by the proper authorities to erect a highway, when the extent of the title will be measured by the claim exhibited by the proceedings. State v. Auchard, 22 M 14, 16, 55 P 361.

Presumption

Where the claimant of a ditch right by prescription over the lands of another has shown an open, visible, continuous and unmolested use of the lands for a period sufficient to acquire title by adverse possession, his use will be presumed to have been adverse and under a claim of right and not by license, the burden of overcoming such presumption being upon the owner of the servient estate. Glantz v. Gabel, 66 M 134, 212 P 858.

Tacking of Prescriptive Periods

In an action seeking confirmation of an easement acquired by prescription,

contention that the doctrine of "tacking" of prescriptive periods is inapplicable where no mention is made of the right claimed in the various deeds to the property may not be sustained, the doctrine being permissible when there is a privity between the successive users of the easement, and there is a sufficient privity as to the inchoate easement if the enjoyment thereof was continuous and under the same claim of title. Groshean v. Dillmont Realty Co., 92 M 227, 240, 12 P 2d 273.

Water Right by Prescription—Essential Requirement-Estoppel by Decree

In order to acquire a prescriptive right to the use of water in an adjudicated stream, the user must have been detri-mental to the one whose title and right are said to have been destroyed, and may not be predicated upon the fact that the use had in no way lessened the source of water for other decreed rights nor tended to destroy them; one claiming a right under a decree where his predecessor in interest was a party to the action is estopped from claiming a right by prescription as against any of the decreed rights. Woodward v. Perkins, 116 M 46, 54, 147 P 2d 1016, appeal dismissed in 119 M 11, 171 P 2d 997.

When Law Presumes a Grant

Where possession of land has been ad-

verse for the statutory period of ten years, the law raises a presumption of a grant, the presumption arising only, however, where the occupancy would otherwise have been unlawful. If the use of the land was permissive in the beginning, it can be changed into a hostile and adverse one only by the most unequivocal conduct on the part of the user; the evidence of adverse possession must be strictly construed against the adverse user, and every reasonable intendment should be made in favor of the true owner. Price v. Western Life Ins. Co., 115 M 509, 513, 146 P 2d 165.

References

Kester v. Amon, 81 M 1, 261 P 288; Miner v. Cook, 87 M 500, 504, 288 P 1016; Cook v. Hudson, 110 M 263, 281, 103 P 2d 137; Stearns v. Benedick, 126 M 272, 247 P 2d 656, 659; Flathead Lumber Corp. v. Everett, 127 M 291, 263 P 2d 376, 378; Thibault v. Flynn, 133 M 461, 325 P 2d 914.

Collateral References

1 Am. Jur. 787, Adverse Possession.

Acquisition of title to mines or minerals by adverse possession. 35 ALR 2d 124.

Solid mineral royalty as real or personal property for purposes of prescription. 68 ALR 2d 734.

CHAPTER 13

ACQUISITION OF PROPERTY BY ACCESSION—FIXTURES—ISLANDS, ETC.

Section 67-1301. Fixtures.

67-1302. Alluvion.

67-1303. Sudden removal of bank.

67-1304. Islands, in navigable streams.

67-1305. In unnavigable streams. 67-1306. Islands formed by divis Islands formed by division of stream.

Fixtures—removal of by tenant. 67-1307.

67-1301. (6819) **Fixtures.** When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as provided in section 67-1307, belongs to the owner of the land, unless he chooses to require the former to remove it.

History: En. Sec. 1400, Civ. C. 1895; re-en. Sec. 4572, Rev. C. 1907; re-en. Sec. 6819, R. C. M. 1921. Cal. Civ. C. Sec. 1013. Based on Field Civ. C. Sec. 442.

Bridge

A person who enters upon and voluntarily constructs a bridge so as to connect portions of an existing public highway separated by a river is not the owner of the bridge, because to all intents and purposes it belongs to the public. State ex rel. Donlan v. Board of Commrs., 49 M 517, 523, 143 P 984.

Where one places a fence on the land of another without an agreement permitting him to do so, it belongs to the owner of the land unless he chooses to require him to remove it, the presumption, disputable in nature, being that one in possession of land is also the owner of fixtures thereon. Schmuck v. Beck, 72 M 606, 614, 234 P 477.

Manner of Attachment

While the question of whether personal property has become affixed to the land is one concerning the intention of the affixer yet it is presumed that when the property is affixed it is intended to become a part of the realty and generally the manner in which the attachment is made, the adaptability of the thing attached to the use to which the realty is applied, together with the intention of the one making the atachment, determines whether the thing attached is realty or personalty. Pritchard Petroleum Co. v. Farmers Co-op. Oil Co., 117 M 467, 474, 161 P 2d 526.

Railroad

Whether rails furnished by a railroad company to a mining company and laid by the latter upon its property to serve its own purposes were trade fixtures within the meaning of this section, depends upon the relation existing between the parties at the time they were laid and their intention with respect to them. Helena & Livingston Smelting & Refining Co. v. Northern Pacific Ry. Co., 62 M 281, 292, 205 P 224, 21 ALR 1080.

Tanks

Two 12,000 gallon capacity tanks weighing four tons each, installed on realty by owner of the realty for use in connection with the oil business and held

in place by their weight without being otherwise attached, were properly held to be a part of the realty and became the plantiff's property when plaintiff established its title to the land. Pritchard Petroleum Co. v. Farmers Co-op. Oil Co., 117 M 467, 474, 161 P 2d 526.

Two 15,000 gallon tanks purchased under conditional sales contract, and affixed to realty by owner and used in owner's oil business, retained their character of personal property under provisions of conditional sales contract. Pritchard Petroleum Co. v. Farmers Co-op. Oil Co., 117 M 467, 474, 161 P 2d 526.

467, 474, 161 P 2d 526.

Two 15,000 gallon tanks installed by defendant on realty which defendant mistakenly believed that it owned, and used by defendant for five years in the oil business conducted on the land, were a part of the realty and became plaintiff's property upon plaintiff's establishing its title to the land. Pritchard Petroleum Co. v. Farmers Co-op. Oil Co., 117 M 467, 475, 161 P 2d 526.

Collateral References

Fixtures 9.
36A C.J.S. Fixtures § 25.
22 Am. Jur. 711, Fixtures.

67-1302. (6820) Alluvion. Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank.

History: En. Sec. 1401, Civ. C. 1895; re-en. Sec. 4573, Rev. C. 1907; re-en. Sec. 6820, R. C. M. 1921. Cal. Civ. C. Sec. 1014. Field Civ. C. Sec. 443.

Accreted Lands-Definition

Under this section and section 67-1305, accreted lands, that is, additions to the area of real estate from the gradual deposit by water of solid material, whether mud, sand, or sediment, producing dry land which before was covered by water, along the banks of a navigable or unnavigable stream, belong to the riparian owner. Bode v. Rollwitz, 60 M 481, 491, 199 P 688.

Accreted lands are additions to the area of land by reason of the gradual deposit of solid material by water, producing dry land which before was covered by water, along the banks of a stream whether navigable or not, belonging to the riparian owner. Unless excepted or reserved, accretions to land pass to purchaser although not described in deed. Smith v. Whitney, 105 M 523, 527, 74 P 2d 450.

Large Excess of Land Left between Shore and Meander Line When Surveyed, Remains Public Domain

Where shown in condemnation action by United States that lands in question were in place when survey made, and large body of unsurveyed land in controversy lay between meander line and low-water mark of Missouri river, such lands (and accretions thereto) remained and continued to be public domain, and where river subsequently changed its channel when ice broke up in spring by cutting across an ox-bow loop, under section 67-302, the abandoned bed belonged to the state of Montana. United States v. Eldredge, 33 F Supp 337.

Meander Lines-Water is Real Boundary

The general rule is that meander lines run in surveying fractional portions are not run as boundaries of the tract, but for defining sinuosities of the banks of stream to ascertain quantity of the upland; title of the grantee of such land is not limited to the meander line; the water constitutes the real boundary line. Smith v. Whitney, 105 M 523, 527, 74 P 2d 450.

Tax Sale—Right Acquired by Purchaser

Accreted lands are included in the assessment of lands described in accordance with the government survey, even though the assessment be limited by its terms to the number of acres specified in the survey, and the tax deed purchaser acquires the same title to such lands, whether described or not, as he does to the upland

adjoining described by the survey. Smith v. Whitney, 105 M 523, 528, 74 P 2d 450.

Collateral References

Navigable Waters 44; Waters and Water Courses 93.

65 C.J.S. Navigable Waters § 81; 93 C.J.S. Waters § 76.

56 Am. Jur. 891, Waters, §§ 476 et seq.

67-1303. (6821) Sudden removal of bank. If a river or stream, navigable or not navigable, carries away, by sudden violence, a considerable and distinguishable part of a bank, and bears it to the opposite bank, or to another part of the same bank, the owner of the part carried away may reclaim it within a year after the owner of the land to which it has been united takes possession thereof.

History: En. Sec. 1402, Civ. C. 1895; re-en. Sec. 4574, Rev. C. 1907; re-en. Sec. 6821, R. C. M. 1921. Cal. Civ. C. Sec. 1015. Field Civ. C. Sec. 444.

Collateral References

Navigable Waters 45; Waters and Water Courses 94.

65 C.J.S. Navigable Waters § 86; 93 C.J.S. Waters § 76.

67-1304. (6822) **Islands, in navigable streams.** Islands and accumulations of land, formed in the beds of streams which are navigable, belong to the state, if there is no title or prescription to the contrary.

History: En. Sec. 1403, Civ. C. 1895; re-en. Sec. 4575, Rev. C. 1907; re-en. Sec. 6822, R. C. M. 1921. Cal. Civ. C. Sec. 1016. Field Civ. C. Sec. 445.

Collateral References

Applicability of rules of accretion and reliction so as to confer title to additions upon owner of island or bar in navigable stream. 54 ALR 2d 643.

67-1305. (6823) In unnavigable streams. An island, or accumulation of land, formed in a stream which is not navigable, belongs to the owner of the shore on that side where the island or accumulation is formed; or, if not formed on one side only, to the owners of the shore on the two sides, divided by an imaginary line drawn through the middle of the river.

History: En. Sec. 1404, Civ. C. 1895; re-en. Sec. 4576, Rev. C. 1907; re-en. Sec. 6823, R. C. M. 1921. Cal. Civ. C. Sec. 1017. Field Civ. C. Sec. 446.

Accreted Land — Belongs to Riparian Owner

Under section 67-1302 and this section, accreted lands, that is, additions to the area of real estate from the gradual de-

posit by water of solid material, whether mud, sand or sediment, producing dry land which before was covered by water, along the banks of a navigable or unnavigable stream, belong to the riparian owner. Bode v. Rollwitz, 60 M 481, 491, 199 P 688.

Collateral References

Waters and Water Courses 592-94. 93 C.J.S. Waters § 76.

67-1306. (6824) Islands formed by division of stream. If a stream navigable or not navigable, in forming itself a new arm, divides itself and surrounds land belonging to the owner of the shore, and thereby forms an island, the island belongs to such owner.

History: En. Sec. 1405, Civ. C. 1895; re-en. Sec. 4577, Rev. C. 1907; re-en. Sec. 6824, R. C. M. 1921. Cal. Civ. C. Sec. 1018. Field Civ. C. Sec. 447.

Collateral References

Navigable Waters 42; Waters and Water Courses 92.

65 C.J.S. Navigable Waters § 115; 93 C.J.S. Waters § 76.

67-1307. (6825) Fixtures—removal of by tenant. A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises.

History: En. Sec. 1406, Civ. C. 1895; re-en. Sec. 4578, Rev. C. 1907; re-en. Sec. 6825, R. C. M. 1921. Cal. Civ. C. Sec. 1019.

When This Section Not Controlling

Section 67-210 is controlling over this section where the question is whether a dredge used in placer mining operations is a fixture, under the rule that a statute dealing with a part of a subject in a more minute and definite way will prevail over one dealing with the same subject in general and comprehensive terms, to the extent of any necessary repugnance between them. Story Gold Dredging Co. v. Wilson, 106 M 166, 175, 76 P 2d 73.

References

Helena & Livingston Smelting & Refining Co. v. Northern Pacific Ry. Co., 62 M 281, 205 P 224, 21 ALR 1080; Schmuck v. Beck, 72 M 606, 615, 234 P 477; Story Gold Dredging Co. v. Wilson, 99 M 347, 42 P 2d 1003; Pritchard Petroleum Co. v. Farmers Co-op. Oil Co., 117 M 467, 474, 477, 161 P 2d 526.

Collateral References

Landlord and Tenant \$\sim 157(4).
51 C.J.S. Landlord and Tenant §§ 387,
395, 397, 399.
22 Am. Jur. 711, Fixtures.

CHAPTER 14

ACQUISITION OF PERSONAL PROPERTY BY ACCESSION—UNION OF PARTS

Section 67-1401. Accession by uniting several things.

67-1402. Principal part, what deemed to be.

67-1403. Same—the more valuable or bulky. 67-1404. Uniting materials and workmanship.

67-1405. Common proprietorship in thing formed.

67 1406. Westerial of remaining former

67-1406. Materials of several owners.

67-1407. Willful trespassers.

67-1408. Owner may elect between the thing and its value.

67-1409. Wrongdoer liable in damages.

67-1401. (6826) Accession by uniting several things. When things belonging to different owners have been united so as to form a single thing, and cannot be separated without injury, the whole belongs to the owner of the thing which forms the principal part; who must, however, reimburse the value of the residue to the other owner, or surrender the whole to him.

History: En. Sec. 1410, Civ. C. 1895; re-en. Sec. 4579, Rev. C. 1907; re-en. Sec. 6826, R. C. M. 1921. Cal. Civ. C. Sec. 1025. Field Civ. C. Sec. 449.

1 C.J.S. Accession § 1 et seq. 1 Am. Jur. 197, Accession.

Accession to motor vehicle. 43 ALR 2d 813.

Collateral References Accession 1, 2.

67-1402. (6827) Principal part, what deemed to be. That part is deemed to be the principal to which the other has been united only for the use, ornament, or completion of the former, unless the latter is the more valuable, and has been united without the knowledge of its owner, who may, in the latter case, require it to be separated and returned to him, although some injury should result to the thing to which it has been united.

History: En. Sec. 1411, Civ. C. 1895; re-en. Sec. 4580, Rev. C. 1907; re-en Sec. 6827, R. C. M. 1921. Cal. Civ. C. Sec. 1026. Field Civ. C. Sec. 450.

References

Andrews v. Smithson, 114 M 360, 365, 136 P 2d 531.

67-1403. (6828) Same—the more valuable or bulky. If neither part can be considered the principal, within the rule prescribed by the last section, the more valuable, or, if the values are nearly equal, the most considerable in bulk, is to be deemed the principal part.

History: En. Sec. 1412, Civ. C. 1895; 6828, R. C. M. 1921. Cal. Civ. C. Sec. 1027. re-en. Sec. 4581, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 451.

67-1404. (6829) Uniting materials and workmanship. If one makes a thing from materials belonging to another, the latter may claim the thing on reimbursing the value of the workmanship, unless the value of the workmanship exceeds the value of the materials, in which case the thing belongs to the maker, on reimbursing the value of the materials.

History: En. Sec. 1413, Civ. C. 1895; 6829, R. C. M. 1921. Cal. Civ. C. Sec. 1028. re-en. Sec. 4582, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 452.

67-1405. (6830) Common proprietorship in thing formed. Where one has made use of materials which in part belong to him and in part to another, in order to form a thing of a new description, without having destroyed any of the materials, but in such a way that they cannot be separated without inconvenience, the thing formed is common to both proprietors; in proportion, as respects the one, of the materials belonging to him, and as respects the other, of the materials belonging to him and the price of his workmanship.

History: En. Sec. 1414, Civ. C. 1895; 6830, R. C. M. 1921. Cal. Civ. C. Sec. 1029. re-en. Sec. 4583, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 453.

67-1406. (6831) Materials of several owners. When a thing has been formed by the admixture of several materials of different owners, and neither can be considered the principal substance, an owner without whose consent the admixture was made may require a separation, if the materials can be separated without inconvenience. If they cannot be thus separated, the owners acquire the thing in common, in proportion to the quantity, quality, and value of their materials; but if the materials of one were far superior to those of the others, both in quantity and value, he may claim the thing on reimbursing to the others the value of their materials.

History: En. Sec. 1415, Civ. C. 1895; 6831, R. C. M. 1921. Cal. Civ. C. Sec. 1030. re-en. Sec. 4584, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 454.

67-1407. (6832) Willful trespassers. The foregoing sections of this article are not applicable to cases in which one willfully uses the materials of another without his consent; but, in such cases, the product belongs to the owner of material, if its identity can be traced.

History: En. Sec. 1416, Civ. C. 1895; re-en. Sec. 4585, Rev. C. 1907; re-en. Sec. 6832, R. C. M. 1921. Cal. Civ. C. Sec. 1031. Field Civ. C. Sec. 455. Collateral References
1 Am. Jur. 203, Accession, § 14.

67-1408. (6833) Owner may elect between the thing and its value. In all cases where one whose material has been used without his knowledge, in order to form a product of a different description, can claim an interest in such product, he has an option to demand either restitution of his material in kind, in the same quantity, weight, measure, and quality, or the value

thereof; or, where he is entitled to the product, the value thereof in place of the product.

History: En. Sec. 1417, Civ. C. 1895; re-en. Sec. 4586, Rev. C. 1907; re-en. Sec. 6833, R. C. M. 1921. Cal. Civ. C. Sec. 1032. Field Civ. C. Sec. 456.

Collateral References

Accession = 2.

1 C.J.S. Accession §§ 6-8.

1 Am. Jur. 208, Accession, §§ 22 et seq.

(6834) Wrongdoer liable in damages. One who wrongfully employs materials belonging to another is liable to him in damages, as well as under the foregoing provisions of this chapter.

History: En. Sec. 1418, Civ. C. 1895; re-en. Sec. 4587, Rev. C. 1907; re-en. Sec. 6834, R. C. M. 1921. Cal. Civ. C. Sec. 1033. Field Civ. C. Sec. 457.

Collateral References

1 Am. Jur. 210, Accession, § 25.

CHAPTER 15

ACQUISITION OF PROPERTY BY TRANSFER—GRANTS AND THEIR INTERPRETATION

Section 67-1501. Transfer defined.

67-1502.

Voluntary transfer. What may be transferred. 67-1503.

67-1504. Possibility.

67-1505. Right of re-entry can be transferred.

Owner ousted of possession may transfer. 67-1506.

When oral.

67-1507. 67-1508. Grant defined.

67-1509. Delivery necessary.

67-1510. Date.

67-1511. 67-1512. 67-1513. Delivery to grantee is necessarily absolute.

Delivery in escrow.

Surrendering or canceling grant does not reconvey.

67-1514. Constructive delivery.

67-1515. Grants-how interpreted.

67-1516. Limitations—how controlled. Recitals-when resorted to.

67-1517. 67-1518. Interpretation against grantor.

67-1519. Irreconcilable provisions.

Meaning of "heirs" and "issue" in certain remainders. 67-1520.

67-1521. Words of inheritance unnecessary.

What title passes. 67-1522.

67-1523. Incidents.

67-1524. Grant may inure to benefit of stranger.

67-1501. (6835) **Transfer defined.** Transfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another.

History: En. Sec. 1430, Civ. C. 1895; re-en. Sec. 4588, Rev. C. 1907; re-en. Sec. 6835, R. C. M. 1921. Cal. Civ. C. Sec. 1039. Field Civ. C. Sec. 458.

91 M 47, 54, 6 P 2d 125; In re Watts' Estate, 117 M 505, 521, 160 P 2d 492; In re Vincent's Estate, 133 M 424, 324 P 2d 403, 412.

References

Genzberger v. Adams, 62 M 430, 435, 205 P 658; Franzke v. Fergus County, 76 M 150, 153, 245 P 962; Department of Agriculture, Labor & Industry v. DeVore,

Collateral References

Assignments 31; Property 11, 12. 6 C.J.S. Assignments § 41; 73 C.J.S. Property §§ 13, 15.

67-1502. (6836) Voluntary transfer. A voluntary transfer is an executed contract subject to all rules of law concerning contracts in general; except that a consideration is not necessary to its validity.

History: En. Sec. 1431, Civ. C. 1895; re-en. Sec. 4589, Rev. C. 1907; re-en. Sec. 6836, R. C. M. 1921. Cal. Civ. C. Sec. 1040. Field Civ. C. Sec. 459.

References

Franzke v. Fergus County, 76 M 150, 153, 245 P 962.

Collateral References

Assignments 1-139; Property 12. 6 C.J.S. Assignments § 1 et seq.; 73. J.S. Property § 15.

C.J.S. Property § 15.
Generally, see 4 Am. Jur. 225, Assignments; 16 Am. Jur. 425, Deeds.

67-1503. (6837) What may be transferred. Property of any kind may be transferred, except as otherwise provided by this chapter.

History: En. Sec. 1440, Civ. C. 1895; re-en. Sec. 4590, Rev. C. 1907; re-en. Sec. 6837, R. C. M. 1921, Cal. Civ. C. Sec. 1044. Field Civ. C. Sec. 460.

securities of which it has become the owner in the ordinary course of business. Genzberger v. Adams, 62 M 430, 435, 205 P 658.

Operation and Effect

A judgment is assignable, and a banking corporation may transfer one owned by it just as it may sell bonds or other

Collateral References

Assignments 4-29; Property 11. 6 C.J.S. Assignments § 9 et seq.; 73 C.J.S. Property § 13.

67-1504. (6838) **Possibility.** A mere possibility, not coupled with an interest, cannot be transferred.

History: En. Sec. 1441, Civ. C. 1895; re-en. Sec. 4591, Rev. C. 1907; re-en. Sec. 6838, R. C. M. 1921. Cal. Civ. C. Sec. 1045. Field Civ. C. Sec. 461.

Operation and Effect

This section being identical in terms with a section of the California Civil Code, the presumption must be indulged that in adopting it the legislature intended that the same construction should prevail in this jurisdiction as prevailed in the state from which it was borrowed. Winslow v. Dundom, 46 M 71, 80, 125 P 136.

Where an option contract for the sale of real property was silent upon the question of its assignability and the intention of the parties was not shown to have been that the right created should be personal to the option holder, and the agreement involved simply the cash payment of the amount of the purchase price mentioned in it, the right was assignable, and enforceable in a court of equity. Winslow v. Dundom, 46 M 71, 82, 125 P 136.

References

Grasswick v. Miller, 82 M 364, 375, 267 P 299.

Collateral References

Assignments \$9; Property \$11. 6 C.J.S. Assignments § 12; 73 C.J.S. Property § 13.

67-1505. (6839) **Right of re-entry can be transferred.** A right of re-entry, or of repossession for breach of condition subsequent, can be transferred.

History: En. Sec. 1442, Civ. C. 1895; re-en. Sec. 4592, Rev. C. 1907; re-en. Sec. 6839, R. C. M. 1921. Cal. Civ. C. Sec. 1046. Based on Field Civ. C. Sec. 462.

Operation and Effect

While under the common law a right of re-entry upon land after breach of a condition subsequent incorporated in a deed does not constitute an interest in real property and is therefore not susceptible of conveyance, under this section such a right may be transferred. Waddell v. School Dist. No. 3, 79 M 432, 440, 257 P 278.

Collateral References

Assignments5; Property11. 6 C.J.S. Assignments §§ 8, 10; 73 C.J.S. Property § 13.

67-1506. (6840) Owner ousted of possession may transfer. Any person claiming title to real property in the adverse possession of another may transfer it with the same effect as if in actual possession.

History: En. Sec. 1443, Civ. C. 1895; re-en. Sec. 4593, Rev. C. 1907; re-en. Sec. 6840, R. C. M. 1921. Cal. Civ. C. Sec. 1047.

Collateral References

Champerty and Maintenance € 4(4), 7. 14 C.J.S. Champerty and Maintenance § 11 et seq. 67-1507 PROPERTY

67-1507. (6841) When oral. A transfer may be made without writing in every case in which a writing is not expressly required by statute.

History: En. Sec. 1450, Civ. C. 1895; re-en. Sec. 4594, Rev. C. 1907; re-en. Sec. 6841, R. C. M. 1921, Cal. Civ. C. Sec. 1052. Field Civ. C. Sec. 463.

Operation and Effect

The transfer of a judgment need not be in writing; hence even though it may have been error to admit a written assignment, the error was harmless, plaintiff having made no effort to show that a transfer had not been made. Genzberger v. Adams, 62 M 430, 435, 205 P 658.

Where an oral transfer of personal property to a third person for the benefit of

the transferee is called in question, the assent of the latter to the transfer must be shown. Department of Agriculture, Labor & Industry v. DeVore, 91 M 47, 54, 6 P 2d 125.

References

Flinner v. McVay, 37 M 306, 313, 96 P 340; Willoburn Ranch Co. v. Yegen, 49 M 101, 110, 140 P 231.

Collateral References

Assignments ≈34; Property ≈12. 6 C.J.S. Assignments § 45 et seq.; 73 C.J.S. Property § 15.

67-1508. (6842) Grant defined. A transfer in writing is called a grant, or conveyance, or bill of sale. The term "grant," in this chapter, includes all these instruments, unless it is specially applied to real property.

History: En. Sec. 1451, Civ. C. 1895; re-en. Sec. 4595, Rev. C. 1907; re-en. Sec. 6842, R. C. M. 1921. Cal. Civ. C. Sec. 1053.

References

Homestake Exploration Corp. v. Schoregge, 81 M 604, 616, 264 P 388; Sylvain v. Page, 84 M 424, 439, 276 P 16; Williard v. Federal Surety Co., 91 M 465, 473, 8 P 2d 633.

67-1509. (6843) **Delivery necessary**. A grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor.

History: En. Sec. 1452, Civ. C. 1895; re-en. Sec. 4596, Rev. C. 1907; re-en. Sec. 6843, R. C. M. 1921. Cal. Civ. C. Sec. 1054. Field Civ. C. Sec. 465.

Conflicting Evidence

Where there is a substantial conflict in the evidence, the judgment will not be disturbed on appeal on the alleged ground of insufficiency of the evidence to sustain it. Springhorn v. Springer, 75 M 294, 300, 243 P 803.

Escrow Deposits

Delivery being a necessity, if a husband and wife give an option to purchase land, and deposit a deed in escrow to be delivered when the option is exercised, but the husband dies before its delivery, his widow is entitled to dower in the land of which her husband died seized, though the deed was delivered after his death by the depositary. Tyler v. Tyler, 50 M 65, 73, 144 P 1090.

Evidence Overcoming Presumption of Nondelivery

Where defendant testified that he saw the deed upon which plaintiff based his claim of title in the possession of the grantor several months after its recordation, presumption of nondelivery flowing therefrom held overcome by proof that the deed was mailed to plaintiff immediately after recording, that possession was in plaintiff through a tenant, that defendant's own conduct thereafter recognized plaintiff's ownership, and that defendant's husband, an attorney, several years after the transfer attached it as belonging to plaintiff in suits for himself and clients. Cook v. Rigney, 113 M 198, 205, 126 P 2d 325.

Incomplete Instrument

Delivery of an incompleted instrument is ineffective; hence where, at the time a lessee signed a receipt for a copy of a lease, the instrument was incomplete in that one of the lessors had not signed it, the court properly found that it was ineffective for failure of delivery, the fact that later in the day, the missing signature was appended not changing the result in the absence of evidence that the instrument was delivered thereafter. Nelson v. Davenport, 86 M 1, 6, 281 P 537.

Placing in Joint Safe Deposit Box

Where deed from mother to daughter was executed but not recorded and placed in mother's safe deposit box, and mother later destroyed the deed, there was no delivery so as to give title to daughter although daughter testified that she had

access to safe deposit box. Cleveland-Arvin v. Cleveland, 123 M 463, 215 P 2d 963.

There Can Be No Delivery after Death of Grantor

There can be no delivery of a deed after the death of the grantor, since a dead man is not capable of any activity; direction by a grantor in a deed which he had signed, sealed and acknowledged, that it be delivered after his death does not amount to constructive delivery; where a deed remains in the possession of the grantor, to be delivered and to take effect after his death, it is void for want of delivery during his lifetime, i.e., to be made operative it must have been made effectual during the grantor's lifetime. Miller v. Talbott, 115 M 1, 16, 139 P 2d 502.

What Does Not Constitute Delivery

Where a deed is placed in the hands of a third person for safekeeping only and not for delivery to the grantee, or the fact that the instrument is a deed is not made known to the depositary at any time before the death of the grantor, or the name of the grantee is not given, and if there is no evidence of the intent of the grantor to part with his control over the deed and title to the property other than the mere fact of delivery to the depositary, transfer of the mere possession of the deed does not constitute delivery; delivery is not complete until the grantor has so dealt with the instrument as a means of divesting his title as to lose control over it and place it beyond his right of recall. Miller v. Talbott, 115 M 1, 9, 139 P 2d 502.

References

Homestake Exploration Corp. v. Schoregge, 81 M 604, 616, 264 P 388; Williard v. Federal Surety Co., 91 M 465, 473, 8 P 2d 633; Carnahan v. Gupton, 109 M 244, 251, 96 P 2d 513; Walsh v. Kennedy, 115 M 551, 567, 147 P 2d 425; In re Watts' Estate, 117 M 505, 521, 160 P 2d 492.

Collateral References

Assignments \$\sim 45\$ and other particular topics.

6 C.J.S. Assignments § 56.

16 Am. Jur. 598, Deeds, §§ 110 et seq.

What constitutes acceptance of deed by grantee. 74 ALR 2d 992.

67-1510. (6844) **Date.** A grant duly executed is presumed to have been delivered at its date.

History: En. Sec. 1453, Civ. C. 1895; re-en. Sec. 4597, Rev. C. 1907; re-en. Sec. 6844, R. C. M. 1921. Cal. Civ. C. Sec. 1055. Field Civ. C. Sec. 466.

Effect of Continued Control by Grantor

The fact that a grantor continues in control and management of property conveyed during his lifetime does not destroy the presumption of delivery arising from due execution and recordation of the deed, where the grantor and grantee stand in the position of husband and wife. Roth v. Palutzke, 137 M 77, 350 P 2d 358, 360.

Effect of Recording

The fact that a deed has been recorded strengthens the presumption that a deed which is duly executed and acknowledged has been delivered. Roth v. Palutzke, 137 M 77, 350 P 2d 358, 360.

Presumption of Delivery Rebuttable

The presumption declared by this section that a grant duly executed is presumed to have been delivered at its date, arising from the certificate of acknowledgment, is not conclusive, but may be overcome by other facts and circumstances, such as that the grantor remained in possession and control of the property for many years and up to the time of its recordation, that after recordation it was returned to him,

etc. Springhorn v. Springer, 75 M 294, 301, 243 P 803.

While the presumption under this section is that a deed duly executed was delivered at its date, such presumption is not conclusive but may be rebutted, and where the facts conclusively show that it was not delivered, the presumption disappears. Carnahan v. Gupton, 109 M 244, 261, 96 P 2d 513.

Prima-Facie Case

Plaintiff, in a quiet title action, by offering in evidence a deed in the ordinary form to the property in question conveying title to him, dated, acknowledged and recorded on the same day, made out a primafacie case, since such a showing gave rise to the statutory presumption of delivery under this section; the buden then resting upon defendant to prove a superior title under section 93-2507. Cook v. Rigney, 113 M 198, 202, 126 P 2d 325.

References

Dubbels v. Thompson, 49 M 550, 557, 143 P 986; Sylvain v. Page, 84 M 424, 439, 276 P 16, 63 ALR 528.

Collateral References

Assignments \$\infty\$ 134 and other particular topics.

6 C.J.S. Assignments § 76.

67-1511. (6845) Delivery to grantee is necessarily absolute. A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery is made.

History: En. Sec. 1454, Civ. C. 1895; re-en. Sec. 4598, Rev. C. 1907; re-en. Sec. 6845, R. C. M. 1921. Cal. Civ. C. Sec. 1056. Field Civ. C. Sec. 467.

Dispossession of Tenant

Where real property is conveyed by warranty deed, the grantee is entitled to immediate possession of the premises, and where at the time of the conveyances they are in the possession of a tenant, no duty rests upon the grantee to dispossess the latter, it being incumbent upon the grantor to deliver possession in accordance with the deed. Adams v. Durfee, 67 M 315, 320, 215 P 664.

Grantor's Continued Occupancy

A grant of real property takes effect upon its delivery by the grantor; and a grant cannot be delivered to a grantee conditionally but is necessarily absolute, and the instrument takes effect thereon discharged of any condition upon which delivery is made; the transfer of actual possession of real property is not a necessary element of conveyance thereof, and the grantor's continued occupancy is not

inconsistent with the alienation thereof by the owner. Walsh v. Kennedy, 115 M 551, 567, 147 P 2d 425.

Placing in Joint Safe Deposit Box

Where deed from mother to daughter was executed but not recorded and placed in mother's safe deposit box, and mother later destroyed the deed, there was no delivery so as to give title to daughter although daughter testified that she had access to safe deposit box. Cleveland-Arvin v. Cleveland, 123 M 463, 215 P 2d 963.

References

Sylvain v. Page, 84 M 424, 439, 276 P 16, 63 ALR 528; Wilson v. Davis, 110 M 356, 368, 103 P 2d 149; Kelly v. Grainey, 113 M 520, 527, 129 P 2d 619; Miller v. Talbott, and Marcyes v. Talbott, 115 M 1, 8, 139 P 2d 502.

Collateral References

Assignments \bigcirc 45 and other particular topics.

6 C.J.S. Assignments § 10.

67-1512. (6846) **Delivery in escrow**. A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and, on delivery by the depositary, it will take effect. While in the possession of the third person, and subject to condition, it is called an escrow.

History: En. Sec. 1455, Civ. C. 1895; re-en. Sec. 4599, Rev. C. 1907; re-en. Sec. 6846, R. C. M. 1921. Cal. Civ. C. Sec. 1057. Based on Field Civ. C. Sec. 468.

Definition of an Escrow

An "escrow" is a written instrument delivered to a third person to take effect upon the happening of a contingency and delivery of it to the person entitled to it. Under this definition, neither money nor a receipted bill, deposited in bank under an agreement between the parties to a proposed lease of coal land, could properly become the subject of an escrow, neither being a written contract. Glendenning v. Slayton, 55 M 586, 593, 179 P 817.

Effect of Conditions

The deposit of a deed to be delivered on the performance of a condition after the death of the grantor—such as the payment of funeral expenses—stands on the same footing as a deposit for delivery unconditionally after death, and the grantee may after the grantor's death perform the condition and take title as of the date when the deed was deposited. Plymale v. Keene, 76 M 403, 410, 247 P 554, distinguished in 109 M 244, 254, 96 P 2d 513.

Effect of Escrow on Owner

Delivery of a deed in escrow by the depositary, after the death of the grantor, does not, under the doctrine of relation, relate back either to the date of the instrument or its delivery to the depositary, so as to defeat the right of dower. Tyler v. Tyler, 50 M 65, 73, 144 P 1090.

Instrument in Escrow Not Effective until Delivered

An instrument delivered into escrow to be delivered on the performance of certain conditions, does not become effective until delivery by the depositary (subject to certain exceptions not involved in the case). Nadeau v. Texas Company, 104 M 558, 565, 69 P 2d 586, 593.

Oral Escrow Agreement with Deed and Check Sufficient

No precise form of words is necessary, and the agreement to deposit an instru-

ment in escrow may be made orally; and where vendor deposited the deed and the vendee the check to be given in payment, in an attorney's office, until vendor procured the release of a mortgage, the deed and check constituted the escrow, and contention of defendant vendee in an action to enforce specific performance that the contract was invalid under the statute of frauds in the absence of a formal, written instrument accompanying the escrow, held not meritorious. Conner v. Helvik, 105 M 437, 450, 73 P 2d 541.

When Delivery Deemed Complete

If a deed, fully executed and so drawn as to convey a present title, is deposited by the grantor with a third person with directions to deliver it to the grantee after the death of the grantor, and the grantor in making such deposit reserves no power to recall or modify it or thereafter to control in any manner its disposition, the delivery will be deemed complete as of the date when the deed is deposited, the intention of the grantor at the time of passing it to such third person being the controlling factor in determining the question of delivery or nondelivery. Plymale v. Keene, 76 M 403, 410, 247 P 554.

The fact that an officer of the bank with which a deed was deposited by the grantor with instructions to deliver it to the grantee, his son, after the grantor's death, testified that if the grantor had demanded the return of the deed his request would have been complied with was properly disregarded by the trial court in arriving at the conclusion that when it was deposited the grantor did not intend to retain any control or dominion over it. Plymale v. Keene, 76 M 403, 410, 247 P 554, distinguished in 109 M 244, 254, 96 P 2d 513.

When Title Passes

Where an owner sells his land on the installment plan and places the contract and deed in escrow, to be delivered to the purchaser upon completion of the payments, the latter does not obtain title until all of the payments are made; until

then, the title is in the vendor. Knapp v. Andrus, 56 M 37, 42, 180 P 908.

Under a contract of sale of real property on deferred payments, as distinguished from one where execution and performance involve but a single transaction, containing a provision that time shall be of the essence thereof, deposit of deed in escrow not conveying a marketable title does not justify the vendee in suspending payments, the effective date of delivery of title by deed in escrow being the date of delivery by the depositary. Silfvast v. Asplund, 93 M 584, 592, 20 P 2d 631.

Where Contract for Deed and Deed Placed in Escrow Vary

While a deed to land is an "agreement" which, when delivered, may modify a contract for the deed, a deed deposited in escrow is but an escrow, does not pass title and can modify the contract only on a clear showing that the opposing party knew of the recitals in the deed and acceded thereto, and that the deed and contract were parts of the same transaction. Hollensteiner v. Anderson, 78 M 122, 129, 252 P 796.

Where a contract for a deed was complete in itself and called for the execution of the deed in compliance with a description of the property contained therein, the deed to be placed in escrow, but the description in the deed did not conform to that contained in the contract and the vendees had not agreed to accept the deed as drawn, the contract cannot be held to have been modified by or merged in the deed. Hollensteiner v. Anderson, 78 M 122, 129, 252 P 796.

References

Carnahan v. Gupton, 109 M 244, 251, 96 P 2d 513; Kelly v. Grainey, 113 M 520, 527, 129 P 2d 619; Miller v. Talbott, and Marcyes v. Talbott, 115 M 1, 8, 139 P 2d 502.

Collateral References

Escrows \$\ 1, 2.
30 C.J.S. Escrows \$\ 1, 2.
19 Am. Jur. 417, Escrow.

67-1513. (6847) Surrendering or canceling grant does not reconvey. Redelivering a grant of real property to the grantor, or canceling it, does not operate to retransfer the title.

History: En. Sec. 1456, Civ. C. 1895; re-en. Sec. 4600, Rev. C. 1907; re-en. Sec. 6847, R. C. M. 1921. Cal. Civ. C. Sec. 1058. Field Civ. C. Sec. 469.

Husband and Wife

After delivery of a deed from husband to wife the mere fact that the grantor regained possession of the instrument and thereafter retained it, did not retransfer the title to him. Sylvain v. Page, 84 M 424, 437, 276 P 16, 63 ALR 528.

Placement of Deed in Safety Deposit Box

The effect of defendant grantee's testimony that he placed the deed delivered to him by grantor in her safety deposit

box, to which he had a key, with the idea that she would probably feel better in case she wanted to change her mind later on, could not explain away her act of making delivery of it, nor indicate that she did not intend to make delivery; the fact that after delivery to the grantee it was given back to the grantor or was found in her deposit box after her death, held not material, since this section provides that

mere delivery of a grant of real property to the grantor does not operate to retransfer the title. Walsh v. Kennedy, 115 M 551, 569, 147 P 2d 425.

Collateral References

Assignments 59 and other particular topics.

6 C.J.S. Assignments § 113.

67-1514. (6848) **Constructive delivery.** Though a grant be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases:

- 1. Where the instrument is, by the agreement of the parties at the time of execution, understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery; or,
- 2. Where it is delivered to a stranger for the benefit of the grantee, and his assent is shown, or may be presumed.

History: En. Sec. 1457, Civ. C. 1895; re-en. Sec. 4601, Rev. C. 1907; re-en. Sec. 6848, R. C. M. 1921. Cal. Civ. C. Sec. 1059. Field Civ. C. Sec. 470.

Circumstances under Which Constructive Delivery Not Maintainable

Under the facts stated, and in the absence of any evidence warranting the conclusion that the grantee was entitled to the immediate possession of the lands deeded and in view of the fact that until his death the grantor, after executing the deeds, dealt with the lands as his own, contention that there was a constructive delivery of the deeds may not be sustained. Delivery thereof must be with intent in the grantor to divest himself of title, a question of fact ascertainable from all of the evidence bearing thereon. Carnahan v. Gupton, 109 M 244, 258, 96 P 2d 513.

Delivery Essential

Delivery of a deed to real property, either actual or constructive, by which the grantor is divested of title and loses control over the property beyond the right of recall, is essential to a vestiture of title in the grantee. Springhorn v. Springer, 75 M 294, 300, 243 P 803.

Delivery Neither Actual Nor Constructive Where Deed Left in Safety Deposit Box with Advice for Delivery after Grantor's Death

Where farmer inserted deeds in sealed envelope addressed to the grantee, his nephew, and placed it in his safety deposit box over which he alone had control, and wrote his nephew that in case of his, grantor's, death, the deeds would be delivered to him by the bank, and for three years dealt with the lands which were assessed to him, as his own, he died intestate, and the deeds were turned over as

instructed, trial court properly found, in action by other heirs to quiet title and cancel the deeds, that the deeds were ineffective to convey title. Carnahan v. Gupton, 109 M 244, 252, 96 P 2d 513.

When Delivery Complete

While delivery of a deed may be either by words or acts or both combined, and actual manual handing over thereof by the grantor to the grantee is not required, the delivery is not complete until the grantor has so dealt with the instrument as a means of divesting his title as to lose all control over it and place it beyond the right of recall. The grantor shall unequivocally indicate it to be his intention that the instrument shall take effect as a conveyance of property. Carnahan v. Gupton, 109 M 244, 252, 96 P 2d 513.

Without Delivery Neither a Conveyance Nor a Reservation Exist—Dead Person Cannot Deliver Deed

Since a dead person is incapable of any activity, there can be no delivery of a deed, executed by him in his lifetime, after death. A reservation of a life estate in the grantor of real property presupposes a conveyance of the property in which the life estate is reserved; hence where there was no such conveyance because the deeds to the property, executed during the lifetime of the grantor, were not delivered until after his death, there could not have been any such reservation. Carnahan v. Gupton, 109 M 244, 257, 96 P 2d 513.

References

Department of Agriculture, Labor & Industry v. DeVore, 91 M 47, 54, 6 P 2d 125; Hastings v. Wise, 91 M 430, 432, 8 P 2d 636; Miller v. Talbott, 115 M 1, 8, 139 P 2d 502.

67-1515. (6849) **Grants—how interpreted.** Grants are to be interpreted in like manner with contracts in general, except so far as is otherwise provided in this chapter.

History: En. Sec. 1470, Civ. C. 1895; re-en. Sec. 4602, Rev. C. 1907; re-en. Sec. 6849, R. C. M. 1921. Cal. Civ. C. Sec. 1066. Field Civ. C. Sec. 472.

References

Adams v. Durfee, 67 M 315, 320, 215 P 664; Norwegian Lutheran Church of America v. Armstrong, 112 M 528, 531, 118 P 2d 380; In re Vincent's Estate, 133 M 424, 324 P 2d 403, 412.

Collateral References

Assignments 72 and other particular topics.
6 C.J.S. Assignments § 116.

Written matter as controlling printed matter in construction of deed. 37 ALR 2d 820.

Conflict between granting and habendum clauses as to estate conveyed. 58 ALR 2d 1374

67-1516. (6850) **Limitations—how controlled.** A clear and distinct limitation in a grant is not controlled by other words less clear and distinct.

History: En. Sec. 1471, Civ. C. 1895; re-en. Sec. 4603, Rev. C. 1907; re-en. Sec. 6850, R. C. M. 1921. Cal. Civ. C. Sec. 1067. Field Civ. C. Sec. 473.

Collateral References

Gift or grant in terms sufficient to carry the whole property absolutely as so

operating where followed by a purported limitation over of property not disposed of by the first taker. 17 ALR 2d 7.

Nontrust life estate expressly given for support and maintenance as limited thereto. 26 ALR 2d 1207.

67-1517. (6851) **Recitals—when resorted to.** If the operative words of a grant are doubtful, recourse may be had to its recitals to assist the construction.

History: En Sec. 1472, Civ. C. 1895; 6851, R. C. M. 1921. Cal. Civ. C. Sec. 1068. re-en. Sec. 4604, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 474.

67-1518. (6852) Interpretation against grantor. A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor.

History: En. Sec. 1473, Civ. C. 1895; re-en. Sec. 4605, Rev. C. 1907; re-en. Sec. 6852, R. C. M. 1921. Cal. Civ. C. Sec. 1069. Field Civ. C. Sec. 475.

Interest Conveyed

Although granting clause of deed read "remise, release and forever quitclaim" where habendum clause read "To have and to hold all and singular the said premises together with the appurtenances unto the said party of the second part, and to his heirs and assigns forever" and certain surface tracts were excepted from the conveyance, the deed was more than a quitclaim deed and passed after-acquired title. Henningsen v. Stromberg, 124 M 185, 221 P 2d 438, 445.

Interpretation of Grants

Generally, a public grant is to be interpreted in favor of the grantor, while one between private parties is to be interpreted

in favor of the grantee; lands in place when a survey was made and adjoining lands were homesteaded, lying between the meander line and the low-water mark of the Missouri river, which subsequently changed its channel, continued to be the property of the United States, except the abandoned bed of the river, which belonged to the state of Montana (citing 67-302, 67-712 and 67-1302). United States v. Eldredge, 33 F Supp 337, 340.

Modification of Easement by City

Where grantor reserved an easement in land conveyed, city purchasing land from grantee could not obtain modification of easement based on need. Missoula v. Mix, 123 M 365, 214 P 2d 212.

References

Mineral County v. Hyde, 111 M 535, 537, 111 P 2d 284.

67-1519. (6853) **Irreconcilable provisions.** If several parts of a grant are absolutely irreconcilable, the former part prevails.

History: En. Sec. 1474, Civ. C. 1895; re-en. Sec. 4606, Rev. C. 1907; re-en. Sec. 6853, R. C. M. 1921. Cal. Civ. C. Sec. 1070. Field Civ. C. Sec. 476.

No Application if Document Not a Grant

This statute has no application where, under the facts stated, because of the wording of a document purporting to be a grant, it cannot be construed as amounting to a grant. Norwegian Lutheran

Church of America v. Armstrong, 112 M 528, 532, 118 P 2d 380.

References

McDaniel v. Hager-Stevenson Oil Co., 75 M 356, 368, 243 P 582.

Collateral References

Assignments € 72 and other particular topics.

6 C.J.S. Assignments § 83.

67-1520. (6854) Meaning of "heirs" and "issue" in certain remainders. Where a future interest is limited by a grant to take effect on the death of any person without heirs, or heirs of his body, or without issue, or in equivalent words, such words must be taken to mean successors, or issue living at the death of the person named as ancestor.

History: Ap. p. Sec. 44, p. 486, Bannack Stat.; re-en. Sec. 44, p. 403, Cod. Stat. 1871; re-en. Sec. 221, 5th Div. Rev. Stat. 1879; re-en. Sec. 279, 5th Div. Comp. Stat. 1887; amd. Sec. 1475, Civ. C. 1895; re-en. Sec. 4607, Rev. C. 1907; re-en. Sec. 6854, R. C. M. 1921. Cal. Civ. C. Sec. 1071. Field Civ. C. Sec. 477.

Collateral References

Remainders 10 and other particular topics.

31 C.J.S. Estates § 91 et seq.

Nature of estates or interests created by grant or devise to one and heirs if donee should have any heirs. 16 ALR 2d 670.

67-1521. (6855) Words of inheritance unnecessary. Words of inheritance or succession are not requisite to transfer a fee in real property.

History: En. Sec. 1476, Civ. C. 1895; re-en. Sec. 4608, Rev. C. 1907; re-en. Sec. 6855, R. C. M. 1921, Cal. Civ. C. Sec. 1072. Field Civ. C. Sec. 478.

Collateral References

Estates©=5 and other particular topics. 31 C.J.S. Estates § 8.

67-1522. (6856) What title passes. A transfer vests in the transferee all the actual title to the thing transferred which the transferor then has, unless a different intention is expressed or is necessarily implied.

History: En. Sec. 1490, Civ. C. 1895; re-en. Sec. 4609, Rev. C. 1907; re-en. Sec. 6856, R. C. M. 1921. Cal. Civ. C. Sec. 1083. Based on Field Civ. C. Sec. 479.

Operation and Effect

Under the common law as well as the codes (67-211, 67-1523 and this section) whoever grants a thing tacitly grants that without which the grant would be of no avail, the principal thing carries with it the incident. Yellowstone Valley Co. v. Associated Mtg. Investors, 88 M 73, 81, 290 P 255, 70 ALR 1002.

References

Homestake Exploration Corp. v. Schoregge, 81 M 604, 616, 264 P 388; Sylvain v. Page, 84 M 424, 439, 276 P 16, 63 ALR 528; Williard v. Federal Surety Co., 91 M 465, 473, 8 P 2d 633.

Collateral References

Assignments € 74. 6 C.J.S. Assignments § 84.

67-1523. (6857) **Incidents.** The transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself.

History: En. Sec. 1491, Civ. C. 1895; 6857, R. C. M. 1921. Cal. Civ. C. Sec. 1084. re-en. Sec. 4610, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 481.

Right to Attorney's Fee Passes to Assignee in the Assignment of Claim for Wages

The right to include a reasonable attorney's fee where an employee is forced to bring suit to recover wages due is statutory, and found in section 41-1306, and the assignment of the wage claim carries with it the right to recover a reasonable attorney's fee, however, where thirty-nine claims are established in one suit, the attorney's fee should not amount to as much as it would have been if thirty-nine individual suits had been brought. Meister v. Farrow, 109 M 1, 18, 92 P 2d 753.

Tacit Grant

Under the common law as well as the codes (67-211, 67-1522 and this section), whoever grants a thing tacitly grants that without which the grant would be of no avail—the principal thing carries with it the incident. Yellowstone Valley Co. v. Associated Mtg. Investors, 88 M 73, 80, 290 P 255, 70 ALR 1002.

Timber Rights

Where a deed conveyed timber together with an easement of way across the land to remove it, in fee simple, the conveyance of the easement expressed without limitation as to time did not show an intent that the grantee's right in the timber should be lost by reason of the failure to remove it within a reasonable time, since the incidents of the grant take their

character from the interest to which they are attached. R. M. Cobban Realty Co. v. Donlan, 51 M 58, 67, 149 P 484.

Use and Occupation

The value of the use and occupation of land is not an incident to the land which passes with a transfer of it; therefore where a trustee in bankruptcy in selling land of the bankrupt did not transfer to the purchaser a right of action against one who had wrongfully occupied it from the date of the bankruptcy adjudication until confirmation of the sale, the purchaser's right of action against the occupant could not antedate the day the trustee's sale was confirmed. Moccasin State Bank v. Waldron, 81 M 579, 586, 264 P 940.

Wage Earner's Claim

After a wage earner has once established his right to preference payment for wages earned within the period of sixty days immediately preceding a levy upon the property of his employer, by giving the notice provided for by the Wageworkers' Law (45-601 to 45-608), he may assign his claim; the assignment carries with it the lien as an incident, and the assignee is therefore entitled to bring suit thereon. Thompson v. Twodot Fertilizer Co., 71 M 486, 492, 230 P 588.

References

Lodge v. Thorpe, 120 M 226, 181 P 2d 598, 599; Yegen v. Cardwell, 133 M 236, 321 P 2d 1077, 1079.

67-1524. (6858) **Grant may inure to benefit of stranger.** A present interest, and the benefit of a condition or covenant respecting property, may be taken by any natural person under a grant, although not named a party thereto.

History: En. Sec. 1492, Civ. C. 1895; re-en. Sec. 4611, Rev. C. 1907; re-en. Sec.

6858, R. C. M. 1921. Cal. Civ. C. Sec. 1805. Field Civ. C. Sec. 482.

CHAPTER 16

TRANSFER OF REAL PROPERTY-METHOD AND EFFECT

Section 67-1601. Requisites for transfer of certain estates.

67-1602. Form of grant.

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67-1607. What easements pass with property. 67-1608. When fee simple is presumed to pass.

67-1609. Subsequently acquired title passes by operation of law.

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67-1616. Implied covenants.

67-1617. What the term "encumbrances" embraces. 67-1618. Lineal and collateral warranties abolished.

67-1601. (6859) Requisites for transfer of certain estates. An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing subscribed by the party disposing of the same, or by his agent thereunto authorized by writing.

History: En. Sec. 1500, Civ. C. 1895; re-en. Sec. 4612, Rev. C. 1907; re-en. Sec. 6859, R. C. M. 1921, Cal. Civ. C. Sec. 1091. Field Civ. C. Sec. 483.

Cross-References

Agreements to sell real property, secs. 74-108 to 74-110.

Conveyances may be made by convicts, sec. 94-4722.

Homesteads, secs. 33-101 to 33-129.

Lien of seller of real property, secs. 45-1101 to 45-1103.

Officer authorized to execute conveyances of real property by cities under commission-manager form of government, sec. 11-3286.

Real estate transfers to be in writing, sec. 93-1401-5.

Recording transfers of property, secs. 73-101 to 73-116.

Conveyance Required for Trade or Exchange

A trade or exchange of lands is not effective under this section unless deeds of conveyance pass between the parties. Price v. Western Life Ins. Co., 115 M 509, 512, 146 P 2d 165.

Deeding to Another, and Holding Unrecorded Reconveyance, Does Not Create Life Estate

Where a son deeded residence property to his parents with the purpose of giving them a life estate therein, they at the same time reconveying it to him, the first deed being recorded but not the second until many years after when litigation over ownership arose, held, that the two instruments constituted a single transaction with record title in the parents and legal title in the son, and since a life estate can be created under this section, only in writing or by operation of law, such an estate was not thereby created. Kelly v. Grainey, 113 M 520, 527, 129 P 2d 619.

Easements

An easement is an interest in land that cannot be created, granted, or transferred except by operation of law, by an instrument in writing, or by prescription. Smith v. Denniff, 24 M 20, 22, 60 P 398; Mannix v. Powell County, 75 M 202, 205, 243 P 568.

Evidence of Contents Other Than Writing Itself

There can be no evidence of the contents of a writing other than the writing itself, unless the original has been lost or destroyed or in the possession of the party against whom the evidence is offered, in the custody of the adverse party and he fails to produce it after reasonable notice, in which cases the proof of loss, or destruction, etc., must first be made, as set forth in section 93-401-12, subds. 1 and 2 and sections 93-1101-9 and 93-1101-10; in the case at bar, plaintiff's testimony as to her deceased grantor's declarations was insufficient to show execution and constructive delivery by irrevocable deposit, as well as hearsay. Wilson v. Davis, 110 M 356, 363, 103 P 2d 149.

Parol Evidence of Signature

Where quitclaim deed was typewritten on printed form which contained lines for the signatures and the acknowledgment but the paper showed no evidence that any name had ever been signed thereto or any notary's seal attached, it could not be shown by parol evidence that the deed was actually signed. Miller v. Miller, 121 M 55, 190 P 2d 72, 75.

Proof of Contents of Instrument in Writing

Testimony by plaintiff that her deceased grantor declared that "Mr. Poore has the papers" and that "they were in Mr. Poore's possession," is merely a parol statement of someone's conclusion, and not proper foundation under subds. 1 and 2, section 93-401-12 or sections 93-1101-9 and 93-1101-10 as proof of loss or destruction or possession in Mr. Poore to permit evidence of contents of transfers, nor can the statement be admitted under sections 93-401-6, 93-401-7, 93-401-10 or 93-401-27, subd. 4 the pertinent exceptions to the rule set forth in section 93-401-2, requiring that a witness testify of his own knowledge. Wilson v. Davis, 110 M 356, 360, 103 P 2d 149.

Statute of Frauds

Performance, partial or complete, under an assignment of a lease for a term exceeding one year, invalid because not in writing, takes the case out of the statute and renders the tenant liable according to its terms. Wells v. Waddell, 59 M 436, 441, 196 P 1000.

The statute of frauds is not intended to cloak fraud, but to prevent it, its aim being to avoid the assertion of claims which from their nature should be evidenced by an instrument in writing signed by the party to be charged or his agent duly authorized. Wells v. Waddell, 59 M 436, 441, 196 P 1000.

References

Standard Oil Co. v. Idaho Community Oil Co., 98 M 131, 37 P 2d 660; Gains v. Van Demark, 106 M 1, 8, 74 P 2d 454; Whitcomb v. Koechel, 117 M 329, 333, 158 P 2d 496; Fiers v. Jacobson, 123 M 242, 211 P 2d 968, 970; Cleveland-Arvin v. Cleveland, 123 M 463, 215 P 2d 963.

Collateral References

Frauds, Statute of \$\infty\$ 62-80, 114-116; Property \$\infty\$ 12.

37 C.J.S. Frauds, Statute of §§ 70 et seq., 201 et seq.; 73 C.J.S. Property § 15. Generally, 16 Am. Jur. 425, Deeds.

Necessity of written authority to enable agent to make contract relating to land within statute of frauds. 27 ALR 606.

Undelivered deed or escrow pursuant to oral contract as satisfying statute of frauds. 100 ALR 196.

Oil and gas royalty as realty for purpose of statute of frauds. 131 ALR 1371.

Effect on validity of instrument in form of deed or provisions therein indicating an intention to postpone or limit the rights of grantee until after the death of grantor. 31 ALR 2d 536.

Sufficiency of description in exception or reservation as to standing timber. 35 ALR 2d 1422.

Written matter as controlling printed matter in construction of deed. 37 ALR 2d 820.

67-1602. (6860) **Form of grant.** A grant of an estate in real property may be made in substance as follows:

"I, A B, in consideration of dollars now paid, grant to C D all the real property situated in (insert name of county) county, state of Montana, bounded (or described) as follows: (Here insert description, or, if the land sought to be conveyed has a descriptive name, it may be described by the name, as, for instance, 'The Norris ranch.')

"Witness my hand this (insert day) day of (insert month), 19...... "A B."

History: En. Sec. 1501, Civ. C. 1895; re-en. Sec. 4613, Rev. C. 1907; re-en. Sec. 6860, R. C. M. 1921. Cal. Civ. C. Sec. 1092.

Sufficiency of Description

Under the rule that where a simple name serves to identify property conveyed, or where reference is made to something which, on being consulted, indicates the property sold, the description is sufficient, a memorandum of agreement of conveyance describing the land as the "Burke homestead at Big Sandy" was sufficient to support a decree of specific performance as against the contention that the property was not sufficiently described. Shaw v. MacNamara & Marlow, Inc., 85 M 389, 396, 278 P 836.

Where Further Recitals Made Document a Contract of Sale

Where it was contended that a document conveyed absolute title because it

opened with the recital "hereby sells, grants and conveys" the property, for and in consideration of, the purchase price, but contained the further recital "to be paid as hereinafter set forth," held, to determine whether it was a grant or a contract of sale, the document must be interpreted in the same manner as an ordinary contract, citing the sections of the code applicable to properly interpret the document. Norwegian Lutheran Church of America v. Armstrong, 112 M 528, 531, 118 P 2d 380.

References

Whitcomb v. Koechel, 117 M 329, 333, 158 P 2d 496.

Collateral References

Deeds 26-36. 26 C.J.S. Deeds §§ 22-30.

67-1603. (6861) Grant by married woman—how acknowledged. No estate in the real property of a married woman passes by any grant purporting to be executed or acknowledged by her, unless the grant or instru-

ment is acknowledged by her in the manner prescribed by sections 39-108 and 39-113.

History: En. Sec. 1502, Civ. C. 1895; 6861, R. C. M. 1921. Cal. Civ. C. Sec. 1093. re-en. Sec. 4614, Rev. C. 1907; re-en. Sec. Based on Field Civ. C. Sec. 486.

67-1604. (6862) Power of attorney of married woman—how acknowledged. A power of attorney of a married woman, authorizing the execution of an instrument transferring an estate in her separate real property, has no validity for that purpose unless acknowledged by her in the manner provided in sections 39-108 and 39-113.

History: En. Sec. 1503, Civ. C. 1895; re-en. Sec. 4615, Rev. C. 1907; re-en. Sec. 6862, R. C. M. 1921, Cal. Civ. C. Sec. 1094.

67-1605. (6863) Attorney in fact—how must execute for principal. When an attorney in fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it, and his own name as attorney in fact.

History: En. Sec. 1504, Civ. C. 1895; re-en. Sec. 4616, Rev. C. 1907; re-en. Sec. 6863, R. C. M. 1921. Cal. Civ. C. Sec. 1095.

Operation and Effect

The common-law rule that deeds executed by an agent or attorney in fact should be executed in the name of the principal has not been abrogated in this state. The rule, in part, finds expression in this section. Shackleton v. Allen Chapel

African M. E. Church, 25 M 421, 424, 65 P 428.

References

Landt v. Schneider, 31 M 15, 20, 77 P 307.

Collateral References

Frauds, Statute of 102. 37 C.J.S. Frauds, Statute of §§ 209, 210.

67-1606. (6864) Change of former name of owner. Any person in whom the title of real estate is vested, who shall afterwards, from any cause, have his or her name changed, shall, in any conveyances of said real estate so held, set forth the name in which he or she derived title to said real estate, and a failure to comply with the provisions of this section shall subject any such person to a penalty of fifty dollars, to be collected by the county attorney of the county in which the real estate is situated, and by him paid into the treasury of said county for the benefit of the common schools thereof.

History: En. Sec. 1505, Civ. C. 1895; re-en. Sec. 4617, Rev. C. 1907; re-en. Sec. 6864, R. C. M. 1921. Cal. Civ. C. Sec. 1096.

67-1607. (6865) What easements pass with property. A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.

History: En. Sec. 1510, Civ. C. 1895; re-en. Sec. 4618, Rev. C. 1907; re-en. Sec. 6865, R. C. M. 1921. Cal. Civ. C. Sec. 1104. Field Civ. C. Sec. 488.

Abandonment of Public Easement— Private Easement

Where original grantor owned fee in county road subject to public easement

for highway purposes and she conveyed tracts of land bordering on such road, a private easement over such county road passed with such conveyance and such private easement would survive the extinguishment of the public easement upon the abandonment of the county road. Mc-Pherson v. Monegan, 120 M 454, 187 P 2d 542, 545.

References

Yegen v. Cardwell, 133 M 236, 321 P 2d 1077, 1079.

Collateral References

Easements \$\sim 24.
28 C.J.S. Easements §§ 35, 37.
17A Am. Jur. 753, Easements, §§ 149-151.

Conveyance of land as bounded by road, street, or other way as giving grantee rights in or to such way. 46 ALR 2d 461.

67-1608. (6866) When fee simple is presumed to pass. A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended.

History: En. Sec. 1511, Civ. C. 1895; re-en. Sec. 4619, Rev. C. 1907; re-en. Sec. 6866, R. C. M. 1921. Cal. Civ. C. Sec. 1105.

Growing Timber

Where a landowner conveyed growing timber, with a right of way over the land for the purpose of removing it, to the buyer, "his heirs and assigns forever," without limitation or condition, a feesimple estate in the timber passed to the grantee, and such grant was not defeated by the latter's failure to cut and remove it within a reasonable time. R. M. Cobban Realty Co. v. Donlan, 51 M 58, 66, 149 P 484.

Mining Claim

One who executes a deed to a portion of a lode claim is presumed to intend to pass the best title he has in the ground. Collins v. McKay, 36 M 123, 132, 92 P 295.

Quitclaim

Although granting clause of deed read "remise, release and forever quitclaim" where habendum clause read "To have and to hold all and singular the said premises together with the appurtenances unto the said party of the second part, and to his heirs and assigns forever" and certain surface tracts were excepted from the conveyance, the deed was more than a quitclaim deed and passed after-acquired title. Henningsen v. Stromberg, 124 M 185, 221 P 2d 438, 445.

The use of the word "quitclaim" does not restrict the conveyance if other language is employed in the instrument indicating the intention to convey the land itself. Henningsen v. Stromberg, 124 M 185, 221 P 2d 438, 443.

Rebuttable Presumptions

The presumptions that a fee-simple title passes by grant of real property unless it appears that a lesser estate was intended, that a thing delivered by one to another belongs to the latter, and that a conveyance made to one toward whom the grantor stands in a confidential relation is a gift, are rebuttable and must give way to proved facts. Hoppin v. Lang, 81 M 330, 339, 263 P 421.

Restriction on Reconveyance

Where there was added to a warranty deed in the usual printed form the statement that the grantees agreed not to sell or dispose of the land except to the grantors or their heirs, it did not limit the interest conveyed to a life estate. In re Vincent's Estate, 133 M 424, 324 P 2d 403, 411.

References

Gantt v. Harper, 82 M 393, 404, 267 P 296.

Collateral References

Deeds 224, 192. 26 C.J.S. Deeds § 109.

67-1609. (6867) Subsequently acquired title passes by operation of law. Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title, or claim of title thereto, the same passes by operation of law to the grantee, or his successors.

History: Ap. p. Sec. 32, p. 401, Cod. Stat. 1871; re-en. Sec. 209, 5th Div. Rev. Stat. 1879; re-en. Sec. 267, 5th Div. Comp. Stat. 1887; amd. Sec. 1512, Civ. C. 1895; re-en. Sec. 4620, Rev. C. 1907; re-en. Sec. 6867, R. C. M. 1921. Cal. Civ. C. Sec. 1106.

Assent by Grantor to Mortgage by Grantee

One who transfers his interest in land by deed absolute or in trust to secure a debt and thereafter agrees to the execution of a mortgage thereon by the grantee is estopped by his deed from later claiming an interest in the property adverse to the mortgagee, and any title he may thereafter acquire inures to the benefit of the mortgagee as security for the payment of the grantor's debts assumed by the grantee. First State Bank v. Mussigbrod, 83 M 68, 84, 271 P 695.

Desert Land

Where an entryman of desert land conveyed it to another before patent who mortgaged it and thereafter the entry was canceled for fraud, whereupon the entryman filed upon the same land under the Enlarged Homestead Act and secured patent, the title thus acquired by him did not inure to the benefit of the mortgagee of his grantee of the desert land, the provisions of this section, sections 67-1610 and 52-110, relating to after-acquired title, having no application under such circumstances, since, to hold otherwise, would be in effect to nullify the act of Congress prohibiting the alienation of public land prior to patent. Phoenix Mut. Life Ins. Co. v. Brainard, 82 M 39, 49, 51, 265 P 10.

Estoppel as Basis

The doctrine that title to realty, acquired by grantor thereof after conveyance, passes to grantee is based on estoppel. Rowell v. Rowell, 119 M 201, 174 P 2d 223, 226, 168 ALR 1141.

Mining Claim

Under this section and section 67-1608, a deed purporting to transfer a portion of a lode claim, which is named therein, located for the purpose of protecting a placer claim from possible adverse claimants prior to procurement of patent for the latter, conveyed such portion of the afterward patented placer claim, lying within the exterior boundaries of the lode claim, as could be identified; and it was immaterial whether the lode location was a valid one as against others or not. Collins v. McKay, 36 M 123, 131, 92 P 295.

Quitclaim

Although granting clause of deed read "remise, release and forever quitclaim" where habendum clause read "To have and to hold all and singular the said premises together with the appurtenances unto the said party of the second part, and to his heirs and assigns forever" and certain surface tracts were excepted from the conveyance, the deed was more than a quitclaim deed and passed after-acquired title. Henningsen v. Stromberg, 124 M 185, 221 P 2d 438, 445.

Royalty Interest

Where person conveyed a 1% royalty of all oil and gas produced and saved from certain land and the instrument of conveyance concluded with the words "and agree to warrant and defend the title to the same and that I have lawful authority to sell and assign said royalty," the instrument was sufficient to pass afteracquired title where grantee had no title at time of execution of instrument. Mitchell v. Pestal, 123 M 142, 208 P 2d 807, 809.

Title Defective at Time of Grant

The statutory rule that title to realty, acquired by grantor thereof after conveyance, passes by operation of law to grantee, applies where grantor's title, at time of grant, is defective or lacking and he obtains title or portion thereof after grant. Rowell v. Rowell, 119 M 201, 174 P 2d 223, 226, 168 ALR 1141.

References

Deck v. Felenzer, 69 M 592, 598, 223 P 499; Morton v. Union Central Life Ins. Co., 80 M 593, 261 P 278; Johannes v. Dwire, 94 M 590, 594, 23 P 2d 971.

Collateral References

Estoppel ≈ 35-43.
31 C.J.S. Estoppel §§ 22-29, 46, 49.
16 Am. Jur. 629, Deeds, §§ 338 et seq.

67-1610. (6868) Grant — how far conclusive on purchasers. Every grant of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or encumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded.

History: En. Sec. 1513, Civ. C. 1895; re-en. Sec. 4621, Rev. C. 1907; re-en. Sec. 6868, R. C. M. 1921. Cal. Civ. C. Sec. 1107. Field Civ. C. Sec. 490.

Operation and Effect

A deed is a declaration that the grantee is vested with a clear title, free from any lawful claim, not only by the grantor but by any other person, except as provided in this section. Dubbels v. Thompson, 49 M 550, 555, 143 P 986.

This section did not apply to a conveyance of a desert land entry before patent, where the entry was subsequently canceled for fraud, even though the same entryman eventually secured patent under the Enlarged Homestead Act, since to apply the section would nullify the congressional policy against alienation before patent. Phoenix Mut. Life Ins. Co. v. Brainard, 82 M 39, 50, 51, 265 P 10.

References

First State Bank v. Mussigbrod, 83 M 68, 84, 271 P 695; Rowell v. Rowell, 119 M 201, 174 P 2d 223, 225, 168 ALR 1141; Cullen v. Reed, 220 Fed 356, 357.

Collateral References

Deeds 90-110; Vendor and Purchaser @m239.

26 C.J.S. Deeds §§ 14, 80-108, 116-122, 134.

67-1611. (6869) Conveyances by owner for life or for years. A grant made by an owner of an estate for life or years, purporting to transfer a greater estate than he could lawfully transfer, does not work a forfeiture of his estate, but passes to the grantee all the estate which the grantor could lawfully transfer.

History: En. Sec. 1514, Civ. C. 1895; re-en. Sec. 4622, Rev. C. 1907; re-en. Sec. 6869, R. C. M. 1921. Cal. Civ. C. Sec. 1108. Field Civ. C. Sec. 491.

Collateral References

Landlord and Tenant 74-79, 104; Life Estates 4, 23.
51 C.J.S. Landlord and Tenant §§ 30-34,

36, 37, 39, 40, 50 et seg., 53, 65.

67-1612. (6870) Grant made on condition subsequent. When a grant is made upon condition subsequent, and is subsequently defeated by the nonperformance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors, by grant, duly acknowledged for record.

History: En. Sec. 1515, Civ. C. 1895; re-en. Sec. 4623, Rev. C. 1907; re-en. Sec. 6870, R. C. M. 1921. Cal. Civ. C. Sec. 1109.

Collateral References

Deeds 168, 183. 26 C.J.S. Deeds §§ 147, 161, 178.

References

Smith v. Hoffman, 56 M 299, 184 P 842.

67-1613. (6871) Grant on condition precedent. An instrument purporting to be a grant of real property, to take effect upon condition precedent, passes the estate upon the performance of the condition.

History: En. Sec. 1516, Civ. C. 1895; re-en. Sec. 4624, Rev. C. 1907; re-en. Sec. 6871, R. C. M. 1921, Cal. Civ. C. Sec. 1110.

Collateral References

Deeds€ 154. 26 C.J.S. Deeds §§ 141, 147.

67-1614. (6872) Attornment of tenant—when unnecessary. When real property is occupied by a tenant, a grant of any estate therein, by his landlord, is valid without an attornment of the tenant to the grantee; but the payment of rent to such grantor, by his tenant, before notice of the grant, is binding upon the grantee; and the tenant is not liable to the grantee for any breach of the condition of the lease until he has had notice of

History: En. Sec. 1517, Civ. C. 1895; re-en. Sec. 4625, Rev. C. 1907; re-en. Sec. 6872, R. C. M. 1921. Cal. Civ. C. Sec. 1111. Field Civ. C. Sec. 493.

Collateral References

Landlord and Tenant 53. 51 C.J.S. Landlord and Tenant § 257.

References

Continental Oil Co. v. McNair Realty Co., 137 M 410, 353 P 2d 100, 108.

67-1615. (6873) Boundary by highway—what passes. A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front of the center thereof, unless a different intent appears from the grant.

History: En. Sec. 1518, Civ. C. 1895; re-en. Sec. 4626, Rev. C. 1907; re-en. Sec. 6873, R. C. M. 1921. Cal. Civ. C. Sec. 1112. Based on Field Civ. C. Sec. 492.

Operation and Effect

Fact that deed described boundary as "following the south side of said county

road" did not show an intent that title was not to pass to the center of the road. McPherson v. Monegan, 120 M 454, 187 P 2d 542, 543.

Collateral References

Boundaries \$20, 21. 11 C.J.S. Boundaries § 43.

67-1616. (6874) Implied covenants. From the use of the word "grant" in any conveyance by which an estate of inheritance or fee simple or possessory title is to be passed, the following covenants, and none other, on the part of the grantor for himself and his heirs to the grantee, his heirs and assigns, are implied, unless restrained by express terms contained in such conveyance:

- 1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee.
- 2. That such estate is at the time of the execution of such conveyance free from encumbrances done, made, or suffered by the grantor, or any person claiming under him.

Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance.

History: Ap. p. Sec. 50, p. 487, Bannack Stat.; re-en. Sec. 50, p. 404, Cod. Stat. 1871; re-en. Sec. 227, 5th Div. Rev. Stat. 1879; re-en. Sec. 285, 5th Div. Comp. Stat. 1887; amd. Sec. 1519, Civ. C. 1895; re-en. Sec. 4627, Rev. C. 1907; re-en. Sec. 6874, R. C. M. 1921. Cal. Civ. C. Sec. 1113.

Cross-References

Damages for breach of covenant, secs. 17-304, 17-305.

Form of covenants of seizin and warranty in conveyance, sec. 74-110.

Abolition of Other Implied Covenants

This section abolishes all implied covenants except the two enumerated. Simonson v. McDonald, 131 M 494, 311 P 2d 982, 983.

Delinquent Taxes

Where by warranty deed the "parties of the first part" grant unto the Northern Company the lands described therein, the grantors impliedly, under the statutes, covenanted that, at the time of the execution of the deed the lands were free from delinquent taxes. Such implied covenant could be sued upon as if expressly set out

in the deed. Schuster v. Northern Co., 127 M 39, 257 P 2d 249, 252.

Tax Liens

A covenant in a deed to warrant and defend plaintiff's "right, title, and interest in and to said premises," and the quiet and peaceable possession thereof, "unto the said party of the second part, his heirs and assigns against the acts and deeds of said party of the first part, and all and every person and persons whomsoever, lawfully claiming or to claim the same," constitutes a sufficient warranty to compel the grantor to answer for taxes lawfully levied on the premises conveyed, and existing as a lien thereon at the time of the conveyance thereof. Milot v. Reed, 11 M 568, 569, 29 P 343.

Collateral References

Covenants \$13. 21 C.J.S. Covenants \$13. 16 Am. Jur. 562, Deeds, §§ 223, 224.

Law Review

Implied grants and reservations of ways of necessity abolished [Simonson v. McDonald, 131 M 494, 311 P 2d 982], 19 Mont. L. Rev. 73 (Fall 1957).

67-1617. (6875) What the term "encumbrances" embraces. The term "encumbrances" includes taxes, assessments, and all liens upon real property.

History: En. Sec. 1520, Civ. C. 1895; re-en. Sec. 4628, Rev. C. 1907; re-en. Sec. 6875, R. C. M. 1921. Cal. Civ. C. Sec. 1114.

References

Anderson v. McClenathan, 62 M 387, 390, 205 P 230; State v. Board of Commrs.,

89 M 37, 79, 296 P 1; Schuster v. Northern Co., 127 M 39, 257 P 2d 249, 252.

Collateral References

Covenants \$\infty 42.

21 C.J.S. Covenants § 42 et seq.

67-1618. (6876) Lineal and collateral warranties abolished. Lineal and collateral warrants, with all their incidents, are abolished; but the heirs and devisees of every person who has made any covenant or agreement in reference to the title of, in, or to any real property, are answerable upon such covenant or agreement to the extent of the land descended or devised to them, in the cases and in the manner prescribed by law.

History: En. Sec. 49, p. 487, Bannack Stat.; re-en. Sec. 49, p. 403, Cod. Stat. 1871; re-en. Sec. 226, 5th Div. Rev. Stat. 1879; re-en. Sec. 284, 5th Div. Comp. Stat. 1887; amd. Sec. 1521, Civ. C. 1895; re-en. Sec. 4629, Rev. C. 1907; re-en. Sec. 6876, R. C. M. 1921. Cal. Civ. C. Sec. 1115.

Collateral References

Covenants 1: Descent and Distribution

€=128; Wills €=839.

21 C.J.S. Covenants § 2; 26A C.J.S. Descent and Distribution § 126; 96 C.J.S. Wills & 1098.

CHAPTER 17

TRANSFER OF PERSONAL PROPERTY-MODES OF TRANSFER

Section 67-1701. When must be in writing.

67-1702.

Transfer by sale, etc.
Transfer of title under sale. 67-1703.

67-1704. Transfer of title under executory agreement for sale.

67-1705. When buyer acquires better title than seller has.

67-1706. Gifts defined.

Gift-how made. 67-1707. 67-1708. Gift not revocable.

67-1709.

Gift in view of death defined.

67-1710. When gift presumed to be in view of death.

67-1711. Revocation of gift in view of death.

Effect of will upon gift. 67-1712. 67-1713. When treated as legacy.

67-1701. (6877) When must be in writing. An interest in an existing trust can be transferred only by operation of law, or by a written instrument, subscribed by the person making the transfer, or by his agent.

History: En. Sec. 1530, Civ. C. 1895; re-en. Sec. 4630, Rev. C. 1907; re-en. Sec. 6877, R. C. M. 1921. Cal. Civ. C. Sec. 1135. Based on Field Civ. C. Sec. 495.

Collateral References

Trusts = 146-148.

90 C.J.S. Trusts § 193 et seq.

67-1702. (6878) Transfer by sale, etc. The mode of transferring other personal property by sale is regulated by sections 74-101 to 74-403 and sections 66-213 to 66-219.

History: En. Sec. 1531, Civ. C. 1895; re-en. Sec. 4631, Rev. C. 1907; re-en. Sec. 6878, R. C. M. 1921. Cal. Civ. C. Sec. 1136. Field Civ. C. Sec. 496. Sales of personal property, secs. 74-101

Stolen property, disposal of, secs. 94-9701 to 94-9707.

Cross-References

Auction sales, secs. 66-213 to 66-219. Chattel mortgages, secs. 52-301 to 52-323. Lost property, duties of finder, secs. 20-401 to 20-414.

Collateral References

Sales 1, 2. 77 C.J.S. Sales § 6.

67-1703. (6879) Transfer of title under sale. The title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not.

History: En. Sec. 1540, Civ. C. 1895; re-en. Sec. 4632, Rev. C. 1907; re-en. Sec. 6879, R. C. M. 1921. Cal. Civ. C. Sec. 1140. Field Civ. C. Sec. 497.

Agreement to Sell Cattle

Evidence held insufficient to show that an agreement to sell certain cattle amounted to an actual sale, so as to make the vendee, who prior to delivery promised to retain a part of the purchase price and pay it to a creditor of the vendor, indebted to such creditor on account thereof. Adlam v. McKnight, 32 M 349, 353, 80 P 613.

Automobile

In an action, in claim and delivery, involving the ownership of a 1928 model of an automobile purchased but not at once delivered because not then in stock, defendant furnishing plaintiff a 1927 model until the arrival of the new one, and the new car upon its arrival having been pointed out to plaintiff as the one bought, but retained by defendant for show purposes for a short time, the latter's contention that plaintiff bought the 1927 car was not sustained by the evidence. Sutton v. Masterson, 86 M 530, 533, 284 P 264.

Bank Credit

Where a buyer, in anticipation of a sale, gave a note and mortgage to a bank on the chattels which were the subject matter of the transaction, the consideration being credit at the bank to the seller in the amount of the purchase price, and the bank failed to extend such credit, the sale was incomplete, title remained in the seller, and the note and mortgage were void, the latter constituting no obstacle to the enforcement of the lien of a subsequent mortgage given by the owner. Loud v. Hanson, 53 M 445, 449, 164 P 544.

Grand Larceny

In a prosecution for grand larceny the information charged defendant, while acting as cashier of a bank, with having stolen a Liberty Bond, the property of one L. and purchased by him on the installment plan. The bond was one of a number subscribed for by the bank to a reserve bank and held in trust for the individual subscribers until full payment therefor was made by them. Held, that title to the bond in question was in the bank, and did not pass to L., under this section, until it was identified on delivery to L. upon final payment, and that, therefore, at the time of the alleged offense, several months prior to delivery, he was not the owner thereof. State v. Wallin, 60 M 332, 338, 199 P 285.

Intention of Parties

The actual passing of a title, as between the parties to a contract of sale of personal property, depends upon the intention of the parties and the identification of the thing sold. Adlam v. McKnight, 32 M 349, 353, 80 P 613.

References

Gallatin County F. Alliance v. Flannery, 59 M 534, 197 P 996; De Mers v. O'Leary, 126 M 528, 254 P 2d 1080, 1084.

Collateral References

Exchange of Property 210; Sales 2181/6.

33 C.J.S. Exchange of Property §§ 3, 6, 11; 77 C.J.S. Sales §§ 127, 245.

Valuables secreted in articles sold. 4 ALR 2d 318.

67-1704. (6880) Transfer of title under executory agreement for sale. Title is transferred by an executory agreement for the sale or exchange of personal property only when the buyer has accepted the thing, or when the seller has completed it, prepared it for delivery, and offered it to the buyer, with intent to transfer the title thereto, in the manner prescribed by the chapter upon offer of performance.

History: En. Sec. 1541, Civ. C. 1895; re-en. Sec. 4633, Rev. C. 1907; re-en. Sec. 6880, R. C. M. 1921. Cal. Civ. C. Sec. 1141. Field Civ. C. Sec. 498.

References

Welch v. Nichols, 41 M 435, 441, 110 P 89; Williams v. Kearns, — M —, 353 P 2d 748, 752.

67-1705. (6881) When buyer acquires better title than seller has. Where the possession of personal property, together with a power to dispose thereof, is transferred by its owner to another person, an executed sale by the latter, while in possession, to a buyer in good faith and in the ordi-

nary course of business, for value, transfers to such buyer the title of the former owner, though he may be entitled to rescind, and does rescind, the transfer made by him.

History: En. Sec. 1542, Civ. C. 1895; re-en. Sec. 4634, Rev. C. 1907; re-en. Sec. 6881, R. C. M. 1921. Cal. Civ. C. Sec. 1142. Field Civ. C. Sec. 499.

Transfer to Secure Antecedent Debt, Not Sale

Where finance company holding a conditional sale contract covering a car, on the advice of the dealer that it could take possession of the car, sell it and apply the proceeds to the indebtedness owing by him, took it with knowledge that the car had been sold, held, the transaction between the company and dealer did not constitute a sale within the meaning of this section, or make the company an innocent purchaser, but amounted to a mere transfer to secure an antecedent debt. Rasmussen v. Lee & Co., 104 M 278, 285, 66 P 2d 119.

Where Owner Estopped to Deny Title in Innocent Purchaser

The owner of an automobile who places it in the hands of an established dealer with apparent authority to sell it, although title is reserved to the owner under a conditional sale contract, is estopped to deny title in an innocent purchaser thereof, who, in the absence of circumstances putting him on guard, was not required to make investigation relative to the status

of the title. Rasmussen v. Lee & Co., 104 M 278, 282, 66 P 2d 119.

Where Purchaser Might Assume Assignment Waived

The buyer of an automobile from a dealer, even though cognizant that finance company had acquired conditional sale contract thereon by assignment with title reserved to the owner, could nevertheless be an innocent purchaser since he could rightfully assume that, waiving its interest in the car, the finance company had consented to the sale and was looking to the dealer for payment. Rasmussen v. Lee & Co., 104 M 278, 282, 66 P 2d 119.

Where Transferee Bona Fide Purchaser but Not Innocent Purchaser

While the cancellation or satisfaction of an antecedent debt constitutes a sufficient consideration for a transfer under section 55-302, and may make the transferee a bona fide purchaser, the mere transfer of property to secure an antecedent debt does not make the transferee an innocent purchaser. Rasmussen v. Lee & Co., 104 M 278, 285, 66 P 2d 119.

Collateral References

Sales € 242. 77 C.J.S. Sales § 291.

67-1706. (6882) **Gifts defined.** A gift is a transfer of personal property, made voluntarily, and without consideration.

History: En. Sec. 1550, Civ. C. 1895; re-en. Sec. 4635, Rev. C. 1907; re-en. Sec. 6882, R. C. M. 1921. Cal. Civ. C. Sec. 1146. Field Civ. C. Sec. 500.

Cross-Reference

Uniform Gifts to Minors Act, secs. 67-1801 to 67-1811.

Operation and Effect

To constitute a gift inter vivos, within the statute, the donor must voluntarily deliver the subject of the gift to the donee with the present intention to vest the legal title in the donee, who must accept it. The essential elements are the delivery, the accompanying intent, and acceptance by the donee. Such a gift is made without condition, and becomes at once irrevocable. O'Neil v. O'Neil, 43 M 505, 511, 117 P 889; Fender v. Foust, 82 M 73, 78, 265 P 15; Baird v. Baird, 125 M 122, 232 P 2d 348, 356.

References

Sylvain v. Page, 84 M 424, 439, 276 P 16, 63 ALR 528.

Collateral References

Gifts 1, 5, 53.

38 C.J.S. Gifts §§ 1, 2, 3, 9, 10, 11, 72, 75, 89.

24 Am. Jur. 730, Gifts, § 2.

67-1707. (6883) Gift—how made. A verbal gift is not valid unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee.

History: En. Sec. 1551, Civ. C. 1895; 6883, R. C. M. 1921. Cal. Civ. C. Sec. 1147. re-en. Sec. 4636, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 501.

Operation and Effect

Where a gift inter vivos is made by a written instrument transferring the title to the donee it is not necessary to the validity of the gift that delivery of the thing given be made to the donee; as in the case of a sale of personal property, so in that of a gift, the transaction between the parties is good whether possession be delivered or not, want of delivery rendering it void only as to creditors and subsequent bona fide purchasers or encumbrancers, and this rule is true with respect to a gift from husband to wife, the fact that the donor at times had possession of the thing given after the execution of the instrument not changing the rule. Sylvain v. Page, 84 M 424, 440, 276 P 16, 63 ALR 528.

Collateral References

Gifts©=17-23, 62. 38 C.J.S. Gifts §§ 19-28. 24 Am. Jur. 738, Gifts, §§ 20 et seq.

Necessity of delivery of stock certificate to complete valid gift of stock. 23 ALR 2d 1171.

Delivery of gift of life insurance policy. 33 ALR 2d 291.

Retention of possession as affecting gift by co-owner of United States Savings Bonds, 37 ALR 2d 1226.

Bonds, 37 ALR 2d 1226.
Delivery as element of gift of donor's own check, 38 ALR 2d 609.

Delivery as essential to gift of tangible chattels or securities by written instrument. 48 ALR 2d 1405.

Delivery as requisite of gift of debt to debtor. 63 ALR 2d 264.

67-1708. (6884) Gift not revocable. A gift, other than a gift in view of death, cannot be revoked by the giver.

History: En. Sec. 1552, Civ. C. 1895; re-en. Sec. 4637, Rev. C. 1907; re-en. Sec. 6884, R. C. M. 1921. Cal. Civ. C. Sec. 1148. Field Civ. C. Sec. 502.

References

Sylvain v. Page, 84 M 424, 439, 276 P 16, 63 ALR 528; Baird v. Baird, 125 M 122, 232 P 2d 348, 356.

Collateral References

Gifts \$\infty 41, 74-76. 38 C.J.S. Gifts \$\\$ 60-62, 108, 110, 113. 24 Am. Jur. 733, Gifts, \$ 5.

67-1709. (6885) Gift in view of death defined. A gift in view of death is one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver.

History: En. Sec. 1553, Civ. C. 1895; re-en. Sec. 4638, Rev. C. 1907; re-en. Sec. 6885, R. C. M. 1921. Cal. Civ. C. Sec. 1149. Field Civ. C. Sec. 503.

Delivery in Trust for Donee

A gift causa mortis may be effected by delivery to a third person in trust for the donee although the gift does not come to the knowledge of the latter and is not accepted by him until after the death of the donor; the acts of the trustee receiving the property are deemed to be in the interest of the donee and the acceptance of the gift is presumed. Stagg v. Stagg, 90 M 180, 188, 300 P 539.

Delivery of Deposit Book

Where donor, believing himself to be in peril of death from heart disease, handed bank passbooks to his brother with the statement that he should have them, the delivery of the books was a sufficient delivery of the deposits represented by them, his intention to make the gift being shown by a writing left with each bank to the effect that the account in each was a joint one upon which the brother could draw

and that on the death of either the other should have what was remaining in the account. Fender v. Foust, 82 M 73, 78, 265 P 15.

Essentials

A gift causa mortis is subject to the following conditions: (1) It must be made in contemplation, fear, or peril of death; (2) the donor must die of the illness or peril which he then fears or contemplates and (3) the delivery must be made with the intent that title shall vest only in case of death. O'Neil v. O'Neil, 43 M 505, 511, 117 P 889.

To constitute a gift one causa mortis, it must have been made in contemplation, fear or peril of death; the donor must have died of the illness or peril which he then feared or contemplated, and delivery of the subject of the gift must have been made with the intent that title should vest only in case of death. Fender v. Foust, 82 M 73, 78, 265 P 15.

One of the essential elements of a gift causa mortis is that the gift is intended to take effect only in case of the death of the giver, but a gift made during the last illness of the giver, or under circumstances which would impress him with an expectation of speedy death, is presumed to be such a gift. Stagg v. Stagg, 90 M 180, 188, 300 P 539.

Inheritance Tax

The phrase "in contemplation of death" with reference to transfers made taxable under the inheritance tax statute is not confined to gifts causa mortis, but embraces gifts inter vivos, even though they are fully executed. In re Wadsworth's Estate, 92 M 135, 149, 11 P 2d 788.

Jurisdiction as to Validity of Gifts

The validity of a gift causa mortis is determinable by the law of the place where it is made, without reference to the domicile of the donor. O'Neil v. O'Neil, 43 M 505, 517, 117 P 889.

Validity of Gift Where Interest Is Reserved

Delivery of promissory notes and Liberty Bonds with the condition that the interest therefrom should go to the donor as long as he lived does not invalidate the gift as one causa mortis, where the other two elements mentioned above necessary to such gifts are present. Fender v. Foust, 82 M 73, 78, 265 P 15.

Collateral References

24 Am. Jur. 733, Gifts, §§ 6-10.

Life insurance policy as subject of gift causa mortis. 33 ALR 2d 289.

Donor's own check as subject of gift causa mortis. 38 ALR 2d 605.

Nature of gift made in contemplation of suicide. 60 ALR 2d 575.

Gift of debt to debtor. 63 ALR 2d 259.

67-1710. (6886) When gift presumed to be in view of death. A gift made during the last illness of the giver, or under circumstances which would impress him with an expectation of speedy death, is presumed to be a gift in view of death.

History: En. Sec. 1554, Civ. C. 1895; re-en. Sec. 4639, Rev. C. 1907; re-en. Sec. 6886, R. C. M. 1921. Cal. Civ. C. Sec. 1150. Field Civ. C. Sec. 504.

References

Stagg v. Stagg, 90 M 180, 188, 300 P 539.

Collateral References

Gifts ≈ 80. 38 C.J.S. Gifts § 116.

67-1711. (6887) Revocation of gift in view of death. A gift in view of death may be revoked by the giver at any time, and is revoked by his recovery from the illness, or escape from the peril, under the presence of which it was made, or by the occurrence of any event which would operate as a revocation of a will made at the same time.

History: En. Sec. 1555, Civ. C. 1895; re-en. Sec. 4640, Rev. C. 1907; re-en. Sec.

6887, R. C. M. 1921. Cal. Civ. C. Sec. 1151. Field Civ. C. Sec. 505.

67-1712. (6888) **Effect of will upon gift.** A gift in view of death is not affected by a previous will; nor by a subsequent will, unless it expresses intention to revoke the gift.

History: En. Sec. 1556, Civ. C. 1895; re-en. Sec. 4641, Rev. C. 1907; re-en. Sec. 6888, R. C. M. 1921. Cal. Civ. C. Sec. 1152. Field Civ. C. Sec. 506.

Collateral References

Gifts 76; Wills 484, 766.

38 C.J.S. Gifts § 108 et seq.; 95 C.J.S. Wills § 294 et seq., 590 et seq.; 96 C.J.S. Wills § 719 et seq.

67-1713. (6889) When treated as legacy. A gift in view of death must be treated as a legacy, so far as relates to the creditors of the giver.

History: En. Sec. 1557, Civ. C. 1895; re-en. Sec. 4642, Rev. C. 1907; re-en. Sec. 6889, R. C. M. 1921, Cal. Civ. C. Sec. 1153. Field Civ. C. Sec. 507.

Collateral References Gifts € 77. 38 C.J.S. Gifts § 97.

CHAPTER 18

UNIFORM GIFTS TO MINORS ACT

Section 67-1801. Definitions.

67-1802. Manner of making gift. 67-1803. Effect of gift. 67-1804. Duties and powers of custodian.

67-1805. Custodian's expenses, compensation, bond and liabilities.

67-1806. Exemption of third persons from liability.

67-1807. Resignation, death or removal of custodian—bond—appointment of successor custodian.

67-1808. Accounting by custodian.

67-1809. Construction.

67-1810. Short title.

67-1811. Vested rights not to be impaired.

67-1801. Definitions. In this act, unless the context otherwise requires:

- (a) An "adult" is a person who has attained the age of twenty-one years.
- A "bank" is a bank, trust company, national banking association, savings bank, industrial bank.
- A "broker" is a person lawfully engaged in the business of effecting transactions in securities for the account of others. The term includes a bank which effects such transactions. The term also includes a person lawfully engaged in buying and selling securities for his own account, through a broker or otherwise, as a part of a regular business.
- (d) "Court" means the district courts of general jurisdiction in the state of Montana.
 - (e) "The custodial property" includes:
- all securities and money under the supervision of the same custodian for the same minor as a consequence of a gift or gifts made to the minor in a manner prescribed in this act;
 - (2) the income from the custodial property; and
- the proceeds, immediate and remote, from the sale, exchange, conversion, investment, reinvestment or other disposition of such securities, money and income.
- A "custodian" is a person so designated in a manner prescribed in this act.
- A "guardian" of a minor includes the general guardian, guardian, tutor or curator of his property, estate or person.
- (h) An "issuer" is a person who places or authorizes the placing of his name on a security (other than as a transfer agent) to evidence that it represents a share, participation or other interest in his property or in an enterprise or to evidence his duty or undertaking to perform an obligation evidenced by the security, or who becomes responsible for or in place of any such person.
- A "legal representative" of a person is his executor or the administrator, general guardian, guardian, committee, conservator, tutor or curator of his property or estate.
- A "member" of a "minor's family" means any of the minor's parents, grandparents, brothers, sisters, uncles and aunts, whether of the whole blood or the half blood, or by or through legal adoption.

- (k) A "minor" is a person who has not attained the age of twentyone years.
- A "security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share. voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation in, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing. The term does not include a security of which the donor is the issuer. A security is in "registered form" when it specifies a person entitled to it or to the rights it evidences and its transfer may be registered upon books maintained for that purpose by or on behalf of the issuer.
- A "transfer agent" is a person who acts as authenticating trustee, transfer agent, registrar or other agent for an issuer in the registration of transfers of its securities or in the issue of new securities, or in the cancellation of surrendered securities.
- (n) A "trust company" is a bank authorized to exercise trust powers in the state of Montana.

History: En. Sec. 1, Ch. 245, L. 1957.

NOTE .- Uniform State Law. Sections 67-1801 through 67-1811 constitute the "Uniform Gifts to Minors Act" approved by the National Conference of Commissioners on Uniform Laws in 1956 and adopted in Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mis-sissippi, Missouri, Nebraska, Nevada, New

Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wishington, West Virginia, West Virgini consin, and Wyoming. The Model Act Concerning Gifts of Securities to Minors, which is similar in many respects, has been adopted in Alaska, Colorado, District of Columbia, Georgia, Louisiana, New Jersey, Ohio, and Rhode Island.

67-1802. Manner of making gift. (a) An adult person may, during his lifetime, make a gift of a security or money to a person who is a minor on the date of the gift:

(1) if the subject of the gift is a security in registered form, by registering it in the name of the donor, another adult person (an adult member of the minor's family, a guardian of the minor) or a trust company, followed, in substance, by the words: "as custodian for

(name of minor)

under the Montana Uniform Gifts to Minors Act":

(2) if the subject of the gift is a security not in registered form, by delivering it to an adult person other than the donor (an adult member, other than the donor, of the minor's family, a guardian of the minor) or a trust company, accompanied by a statement of gift in the following form, in substance, signed by the donor and the person designated as custodian:

"GIFT UNDER THE MONTANA UNIFORM GIFTS TO MINORS ACT

I, as custodian (name of custodian) (name of donor)

for under the Montana Uniform Gifts to Minors Act,
(name of minor)
the following security(ies):
(insert an appropriate description of the security or securities de-
livered sufficient to identify it or them.)
(signature of donor)
hereby acknowledges receipt of the above described
(name of custodian)
security(ies) as custodian for the above minor under the Montana Uni-
form Gifts to Minors Act.
Dated:
(Signature of custodian)"

(3) If the subject of the gift is money, by paying or delivering it to a broker or a bank for credit to an account in the name of the donor, another adult person (an adult member of the minor's family, a guardian of the minor) or a bank with trust powers, followed in substance, by the words: "as custodian for under the Montana Uniform

(name of minor)

Gifts to Minors Act."

- (b) Any gift made in a manner prescribed in subsection (a) may be made to only one minor and only one person may be the custodian.
- (c) A donor who makes a gift to a minor in a manner prescribed in subsection (a) shall promptly do all things within his power to put the subject of the gift in the possession and control of the custodian, but neither the donor's failure to comply with this subsection, nor his designation of an ineligible person as custodian, nor renunciation by the person designated as custodian affects the consummation of the gift.

History: En. Sec. 2, Ch. 245, L. 1957.

- 67-1803. Effect of gift. (a) A gift made in a manner prescribed in this act is irrevocable and conveys to the minor indefeasibly vested legal title to the security or money given, but no guardian of the minor has any right, power, duty or authority with respect to the custodial property except as provided in this act.
- (b) By making a gift in a manner prescribed in this act, the donor incorporates in his gift all the provisions of this act and grants to the custodian, and to any issuer, transfer agent, bank, broker or third person dealing with a person designated as custodian, the respective powers, rights and immunities provided in this act.

History: En. Sec. 3, Ch. 245, L. 1957.

- 67-1804. Duties and powers of custodian. (a) The custodian shall collect, hold, manage, invest and reinvest the custodial property.
- (b) The custodian shall pay over to the minor for expenditure by him, or expend for the minor's benefit, so much of or all the custodial property as the custodian deems advisable for the support, maintenance,

education and benefit of the minor in the manner, at the time or times, and to the extent that the custodian in his discretion deems suitable and proper, with or without court order, with or without regard to the duty of himself or of any other person to support the minor or his ability to do so, and with or without regard to any other income or property of the minor which may be applicable or available for any such purpose.

- (c) The court, on the petition of a parent or guardian of the minor or of the minor, if he has attained the age of fourteen years, may order the custodian to pay over to the minor for expenditure by him or to expend so much of or all the custodial property as is necessary for the minor's support, maintenance or education.
- (d) To the extent that the custodial property is not so expended, the custodian shall deliver or pay it over to the minor on his attaining the age of twenty-one years or, if the minor dies before attaining the age of twenty-one years, he shall thereupon deliver or pay it over to the estate of the minor.
- (e) The custodian, notwithstanding statutes restricting investments by fiduciaries, shall invest and reinvest the custodial property as would a prudent man of discretion and intelligence who is seeking a reasonable income and the preservation of his capital, except that he may, in his discretion and without liability to the minor or his estate, retain a security given to the minor in a manner prescribed in this act.
- (f) The custodian may sell, exchange, convert or otherwise dispose of custodial property in the manner, at the time or times, for the price or prices and upon the terms he deems advisable. He may vote in person or by general or limited proxy a security which is custodial property. He may consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution or liquidation of an issuer, a security which is custodial property, and to the sale, lease, pledge or mortgage of any property by or to such an issuer, and to any other action by such an issuer. He may execute and deliver any and all instruments in writing which he deems advisable to carry out any of his powers as custodian.

Gifts to Minors Act." The custodian shall keep all other custodial property separate and distinct from his own property in a manner to identify it clearly as custodial property.

(h) The custodian shall keep records of all transactions with respect to the custodial property and make them available for inspection at reasonable intervals by a parent or legal representative of the minor or by the minor, if he has attained the age of fourteen years.

(i) A custodian has (and holds as powers in trust), with respect to the custodial property, in addition to the rights and powers provided in this act, all the rights and powers which a guardian has with respect to property not held as custodial property.

History: En. Sec. 4, Ch. 245, L. 1957.

67-1805. Custodian's expenses, compensation, bond and liabilities.

- (a) A custodian is entitled to reimbursement from the custodial property for his reasonable expenses incurred in the performance of his duties.
 - (b) A custodian may act without compensation for his services.
- (c) Unless he is a donor, a custodian may receive from the custodial property reasonable compensation for his services determined by one of the following standards in the order stated:
 - (1) A direction by the donor when the gift is made;
 - (2) A statute of this state applicable to custodians;
 - (3) The statute of this state applicable to guardians;
 - (4) An order of the court.
- (d) Except as otherwise provided in this act, a custodian shall not be required to give a bond for the performance of his duties.
- (e) A custodian not compensated for his services is not liable for losses to the custodial property unless they result from his bad faith, intentional wrongdoing or gross negligence or from his failure to maintain the standard of prudence in investing the custodial property provided in this act.

History: En. Sec. 5, Ch. 245, L. 1957.

67-1806. Exemption of third persons from liability. No issuer, transfer agent, bank, broker or other person acting on the instructions of or otherwise dealing with any person purporting to act as a donor or in the capacity of a custodian is responsible for determining whether the person designated by the purported donor or purporting to act as a custodian has been duly designated or whether any purchase, sale or transfer to or by or any other act of any person purporting to act in the capacity of custodian is in accordance with or authorized by this act, or is obliged to inquire into the validity or propriety under this act of any instrument or instructions executed or given by a person purporting to act as a donor or in the capacity of a custodian, or is bound to see to the application by any person purporting to act in the capacity of a custodian of any money or other property paid or delivered to him.

History: En. Sec. 6, Ch. 245, L. 1957.

- 67-1807. Resignation, death or removal of custodian—bond—appointment of successor custodian. (a) Only an adult member of the minor's family, a guardian of the minor or a trust company is eligible to become a successor custodian. A successor custodian has all the rights, powers, duties and immunities of a custodian designated in a manner prescribed by this act.
- $\left(b\right)$ A custodian, other than the donor, may resign and designate his successor by:

- (1) executing an instrument of resignation designating the successor custodian: and
- (2) causing each security which is custodial property and in registered form to be registered in the name of the successor custodian followed. in substance, by the words: "as custodian for under the (name of minor)

Montana Uniform Gifts to Minors Act": and

- delivering to the successor custodian the instrument of resignation, each security registered in the name of the successor custodian and all other custodial property, together with any additional instruments required for the transfer thereof.
- (c) A custodian, whether or not a donor, may petition the court for permission to resign and for the designation of a successor custodian.
- If the person designated as custodian is not eligible, renounces or dies before the minor attains the age of twenty-one years, the guardian of the minor shall be successor custodian. If the minor has no guardian, a donor, his legal representative, the legal representative of the custodian, an adult member of the minor's family, or the minor, if he has attained the age of fourteen years, may petition the court for the designation of a successor custodian.
- (e) A donor, the legal representative of a donor, an adult member of the minor's family, a guardian of the minor or the minor, if he has attained the age of fourteen years, may petition the court that, for cause shown in the petition, the custodian be removed and a successor custodian be designated or, in the alternative, that the custodian be required to give bond for the performance of his duties.
- Upon the filing of a petition as provided in this section, the district court shall grant an order, directed to the persons and returnable on such notice as the court may require, to show cause why the relief prayed for in the petition should not be granted and, in due course, grant such relief as the court finds to be in the best interests of the minor.

History: En. Sec. 7, Ch. 245, L. 1957.

- Accounting by custodian. (a) The minor, if he has attained the age of fourteen years, or the legal representative of the minor, an adult member of the minor's family, or a donor or his legal representative may petition the court for an accounting by the custodian or his legal representative.
- The court, in a proceeding under this act or otherwise, may require or permit the custodian or his legal representative to account and, if the custodian is removed, shall so require and order delivery of all custodial property to the successor custodian and the execution of all instruments required for the transfer thereof.

History: En. Sec. 8, Ch. 245, L. 1957.

67-1809. Construction. (a) This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(b) This act shall not be construed as providing an exclusive method for making gifts to minors.

History: En. Sec. 9, Ch. 245, L. 1957.

67-1810. Short title. This act may be cited as the "Montana Uniform Gifts to Minors Act."

History: En. Sec. 10, Ch. 245, L. 1957.

67-1811. Vested rights not to be impaired. Nothing in this act shall be construed to impair constitutionally vested rights.

History: En. Sec. 12, Ch. 245, L. 1957.

CHAPTER 19

PRINCIPAL AND INCOME ACT

Section 67-1901. Definitions. Act to govern ascertainment of principal and income and apportion 67-1902. ment of receipts and expenses. Receipts constituting income or principal-use. 67-1903. Death of tenant between payment dates-apportionment. 67-1904. 67-1905. Corporate dividends-stock dividends-subscription rights-liquidation of corporation-merger. 67-1906. Bonds or obligations as principal-valuation-loss or gain on sale. 67-1907. Operation of business-net profits-ascertaining income-increase or loss of principal. Animals constituting principal-offspring. 67-1908. 67-1909. Natural resources—proceeds from severance. 67-1910. Property subject to depletion as principal. Unprofitable principal—change in form of investment—delayed in-67-1911. 67-1912. Expenses—apportionment. 67-1913. Expenses where no trust created—improvements. 67-1914. Interpretation of act—uniformity. 67-1915. 67-1916. Short title. Effective date—application to estates created after date.

67-1901. Definitions. "Principal" as used in this act means any realty or personalty which has been so set aside or limited by the owner thereof or person thereto legally empowered that it and any substitutions for it are eventually to be conveyed, delivered or paid to a person, while the return therefrom or use thereof or any part of such return or use is in the meantime to be taken or received by or held for accumulation for the same or another person;

"Income" as used in this act means the return derived from principal; "Tenant" as used in this act means the person to whom income is presently or currently payable, or for whom it is accumulated or who is entitled to the beneficial use of the principal presently and for a time prior to its distribution;

"Remainderman" as used in this act means the person ultimately entitled to the principal, whether named or designated by the terms of the transaction by which the principal was established or determined by operation of law;

"Trustee" as used in this act includes the original trustee of any trust to which the principal may be subject and also any succeeding or added trustee. History: En. Sec. 1, Ch. 277, L. 1959.

NOTE.—Uniform State Law. Sections 67-1901 through 67-1916 constitute the "Uniform Principal and Income Act" approved by the National Conference of Commissioners on Uniform State Laws in 1931 and adopted in Alabama, Arizona, Colo-

rado, Connecticut, Florida, Illinois, Kansas, Kentucky, Louisiana, Maryland, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin.

67-1902. Act to govern ascertainment of principal and income and apportionment of receipts and expenses. This act shall govern the ascertainment of income and principal, and the apportionment of receipts and expenses between tenants and remaindermen, in all cases where a principal has been established with or, unless otherwise states [stated] hereinafter, without the interposition of a trust; except that in the establishment of the principal, provision may be made touching all matters covered by this act, and the person establishing the principal may himself direct the manner of ascertainment of income and principal and the apportionment of receipts and expenses or grant discretion to the trustee or other person to do so, and such provision and direction, where not otherwise contrary to law, shall control notwithstanding this act.

History: En. Sec. 2, Ch. 277, L. 1959.

Compiler's Note

The bracketed word "stated" was inserted by the compiler.

- 67-1903. Receipts constituting income or principal—use. (1) All receipts of money or other property paid or delivered as rent of realty or hire of personalty or dividends on corporate shares payable other than in shares of the corporation itself, or interest on money loaned, or interest on or the rental or use value of property wrongfully withheld or tortiously damaged, or otherwise in return for the use of principal, shall be deemed income unless otherwise expressly provided in this act.
- (2) All receipts of money or other property paid or delivered as the consideration for the sale or other transfer, not a leasing or letting, of property forming a part of the principal, or as a repayment of loans, or in liquidation of the assets of a corporation, or as the proceeds of property taken on eminent domain proceedings where separate awards to tenant and remainderman are not made, or as proceeds of insurance upon property forming a part of the principal except where such insurance has been issued for the benefit of either tenant or remainderman alone, or otherwise as a refund or replacement or change in form of principal, shall be deemed principal unless otherwise expressly provided in this act. Any profit or loss resulting upon any change in form of principal shall inure to or fall upon principal.
- (3) All income after payment of expenses properly chargeable to it shall be paid and delivered to the tenant or retained by him if already in his possession or held for accumulation where legally so directed by the terms of the transaction by which the principal was established; while the principal shall be held for ultimate distribution as determined by the terms of the transaction by which it was established or by law.

History: En. Sec. 3, Ch. 277, L. 1959.

67-1904 PROPERTY

67-1904. Death of tenant between payment dates—apportionment. Whenever a tenant shall have the right to income from periodic payments, which shall include rent, interest on loans, and annuities, but shall not include dividends on corporate shares, and such right shall cease and determine by death or in any other manner at a time other than the date when such periodic payments should be paid, he or his personal representative shall be entitled to that portion of any such income next payable which amounts to the same percentage thereof as the time elapsed from the last due date of such periodic payments to and including the day of the determination of his right is of the total period during which such income would normally accrue. The remaining income shall be paid to the person next entitled to income by the terms of the transaction by which the principal was established. But no action shall be brought by the trustee or tenant to recover such apportioned income or any portion thereof until after the day on which it would have become due to the tenant but for the determination of the right of the tenant entitled thereto. The provisions of this section shall apply whether an ultimate remainderman is specifically named or not. Likewise when the right of the first tenant accrues at a time other than the payment dates of such periodic payments, he shall only receive that portion of such income which amounts to the same percentage thereof as the time during which he has been so entitled is of the total period during which such income would normally accrue; the balance shall be a part of the principal.

History: En. Sec. 4, Ch. 277, L. 1959.

- 67-1905. Corporate dividends—stock dividends—subscription rights—liquidation of corporation—merger. (1) All dividends on shares of a corporation forming a part of the principal which are payable in the shares of the corporation shall be deemed principal. Subject to the provisions of this section, all dividends payable otherwise than in the shares of the corporation itself, including ordinary and extraordinary dividends and dividends payable in shares or other securities or obligations of corporations other than the declaring corporation, shall be deemed income. Where the trustee shall have the option of receiving a dividend either in cash or in the shares of the declaring corporation, it shall be considered as a cash dividend and deemed income, irrespective of the choice made by the trustee.
- (2) All rights to subscribe to the shares or other securities or obligations of a corporation accruing on account of the ownership of shares or other securities in such corporation, and the proceeds of any sale of such rights, shall be deemed principal. All rights to subscribe to the shares or other securities or obligations of a corporation accruing on account of the ownership of shares or other securities in another corporation, and the proceeds of any sale of such rights, shall be deemed income.
- (3) Where the assets of a corporation are liquidated, amounts paid upon corporate shares as each dividends declared before such liquidation occurred or as arrears of preferred or guaranteed dividends shall be deemed income; all other amounts paid upon corporate shares on disbursement of the corporate assets to the stockholders shall be deemed principal. All

disbursements of corporate assets to the stockholders, whenever made, which are designated by the corporation as a return of capital or division of corporate property shall be deemed principal.

- (4) Where a corporation succeeds another by merger, consolidation or reorganization or otherwise acquires its assets, and the corporate shares of the succeeding corporation are issued to the shareholders of the original corporation in like proportion to, or in substitution for, their shares of the original corporation, the two corporations shall be considered a single corporation in applying the provisions of this section. But two corporations shall not be considered a single corporation under this section merely because one owns corporate shares of or otherwise controls or directs the other.
- (5) In applying this section the date when a dividend accrues to the person who is entitled to it shall be held to be the date specified by the corporation as the one on which the stockholders entitled thereto are determined, or in default thereof the date of declaration of the dividend.

History: En. Sec. 5, Ch. 277, L. 1959.

67-1906. Bonds or obligations as principal—valuation—loss or gain on sale. Where any part of the principal consists of bonds or other obligations for the payment of money, they shall be deemed principal at their inventory value or in default thereof at their market value at the time the principal was established, or at their cost where purchased later, regardless of their par or maturity value; and upon their respective maturities or upon their sale any loss or gain realized thereon shall fall upon or inure to the principal.

History: En. Sec. 6, Ch. 277, L. 1959.

- 67-1907. Operation of business—net profits—ascertaining income—increase or loss of principal. (1) Whenever a trustee or a tenant is authorized by the terms of the transaction by which the principal was established, or by law to use any part of the principal in the continuance of a business which the original owner of the property comprising the principal had been carrying on, the net profits of such business attributable to such principal shall be deemed income.
- (2) Where such business consists of buying and selling property, the net profits for any period shall be ascertained by deducting from the gross returns during and the inventory value of the property at the end of such period, the expenses during and the inventory value of the property at the beginning of such period.
- (3) Where such business does not consist of buying and selling property, the net income shall be computed in accordance with the customary practice of such business, but not in such way as to decrease the principal.
- (4) Any increase in the value of the principal used in such business shall be deemed principal, and all losses in any one calendar year, after the income from such business for that year has been exhausted, shall fall upon principal.

History: En. Sec. 7, Ch. 277, L. 1959.

67-1908. Animals constituting principal—offspring. Where any part of the principal consists of animals employed in business, the provisions of section 67-1907 shall apply; and in other cases where the animals are held as a part of the principal partly or wholly because of the offspring or increase which they are expected to produce, all offspring or increase shall be deemed principal to the extent necessary to maintain the original number of such animals and the remainder shall be deemed income; and in all other cases such offspring or increase shall be deemed income.

History: En. Sec. 8, Ch. 277, L. 1959.

67-1909. Natural resources—proceeds from severance. Where any part of the principal consists of property in lands from which may be taken timber, minerals, oils, gas or other natural resources and the trustee or tenant is authorized by law or by the terms of the transaction by which the principal was established to sell, lease or otherwise develop such natural resources, and no provision is made for the disposition of the net proceeds thereof after the payment of expenses and carrying charges on such property, such proceeds, if received as rent on a lease, shall be deemed income, but if received as consideration, whether as royalties or otherwise, for the permanent severance of such natural resources from the lands, shall be deemed principal to be invested to produce income. Nothing in this section shall be construed to abrogate or extend any right which may otherwise have accrued by law to a tenant to develop or work such natural resources for his own benefit.

History: En. Sec. 9, Ch. 277, L. 1959.

67-1910. Property subject to depletion as principal. Where any part of the principal consists of property subject to depletion, such as lease-holds, patents, copyrights and royalty rights, and the trustee or tenant in possession is not under a duty to change the form of the investment of the principal, the full amount of rents, royalties or return from the property shall be income to the tenant; but where the trustee or tenant is under a duty, arising either by law or by the terms of the transaction by which the principal was established, to change the form of the investment, either at once or as soon as it may be done without loss, then the return from such property not in excess of five per centum (5%) per annum of its fair inventory value or in default thereof its market value at the time the principal was established, or at its cost where purchased later, shall be deemed income and the remainder principal.

History: En. Sec. 10, Ch. 277, L. 1959.

67-1911. Unprofitable principal—change in form of investment—delayed income. (1) Where any part of a principal in the possession of a trustee consists of realty or personalty which for more than a year and until disposed of as hereinafter stated has not produced an average net income of at least one per centum (1) per annum of its fair inventory value or in default thereof its market value at the time the principal was established or of its cost where purchased later, and the trustee is under a duty to change the form of the investment as soon as it may be done without sacrifice of value and such change is delayed, but is made before the principal is finally distributed, then the tenant, or in case of his death his personal representative, shall be entitled to share in the net proceeds received from the property as delayed income to the extent hereinafter stated.

- (2) Such income shall be the difference between the net proceeds received from the property and the amount which, had it been placed at simple interest at the rate of five per centum (5%) per annum for the period during which the change was delayed, would have produced the net proceeds at the time of change, but in no event shall such income be more than the amount by which the net proceeds exceed the fair inventory value of the property or in default thereof its market value at the time the principal was established or its cost where purchased later. The net proceeds shall consist of the gross proceeds received from the property less any expenses incurred in disposing of it and less all carrying charges which have been paid out of principal during the period while it has been unproductive.
- (3) The change shall be taken to have been delayed from the time when the duty to make it first arose, which shall be presumed, in the absence of evidence to the contrary, to be one (1) year after the trustee first received the property if then unproductive, otherwise one (1) year after it became unproductive.
- (4) If the tenant has received any income from the property or has had any beneficial use thereof during the period while the change has been delayed, his share of the delayed income shall be reduced by the amount of such income received or the value of the use had.
- (5) In the case of successive tenants the delayed income shall be divided among them or their representatives according to the length of the period for which each was entitled to income.

History: En. Sec. 11, Ch. 277, L. 1959.

- 67-1912. Expenses—apportionment. (1) All ordinary expenses incurred in connection with the trust estate or with its administration and management, including regularly recurring taxes assessed against any portion of the principal, water rates, premiums on insurance taken upon the estates of both tenant and remainderman, interest on mortgages on the principal, ordinary repairs, trustees' compensation except commissions computed on principal, compensation of assistants, and court costs and attorneys' and other fees on regular accountings, shall be paid out of income. But such expenses where incurred in disposing of, or as carrying charges on, unproductive estate as defined in section 67-1911, shall be paid out of principal, subject to the provisions of subsection (2) of section 67-1911.
- (2) All other expenses, including trustees' commissions computed upon principal, cost of investing or reinvesting principal, attorneys' fees and other costs incurred in maintaining or defending any action to protect the trust or the property or assure the title thereof, unless due to the fault or cause of the tenant, and costs of, or assessments for, improvements to property forming part of the principal, shall be paid out of principal. Any tax levied by any authority, federal, state or foreign, upon profit or gain

defined as principal under the terms of subsection (2) of section 67-1903 shall be paid out of principal, notwithstanding said tax may be denominated a tax upon income by the taxing authority.

- (3) Expenses paid out of income according to subsection (1) which represent regularly recurring charges shall be considered to have accrued from day to day, and shall be apportioned on that basis whenever the right of the tenant begins or ends at some date other than the payment date of the expenses. Where the expenses to be paid out of income are of unusual amount, the trustee may distribute them throughout an entire year or part thereof, or throughout a series of years. After such distribution, where the right of the tenant ends during the period, the expenses shall be apportioned between tenant and remainderman on the basis of such distribution.
- (4) Where the costs of, or special taxes or assessments for, an improvement representing an addition of value to property held by the trustee as part of principal are paid out of principal, as provided in subsection (2), the trustee shall reserve out of income and add to the principal each year a sum equal to the cost of the improvement divided by the number of years of the reasonably expected duration of the improvement.

History: En. Sec. 12, Ch. 277, L. 1959.

- 67-1913. Expenses where no trust created—improvements. (1) The provisions of section 67-1912, so far as applicable and excepting those dealing with costs of, or special taxes or assessments for, improvements to property, shall govern the apportionment of expenses between tenants and remaindermen where no trust has been created, subject, however, to any legal agreement of the parties or any specific direction of the taxing or other statutes; but where either tenant or remainderman has incurred an expense for the benefit of his own estate and without the consent or agreement of the other, he shall pay such expense in full.
- (2) Subject to the exceptions stated in subsection (1) the cost of, or special taxes or assessments for, an improvement representing an addition of value to property forming part of the principal shall be paid by the tenant, where such improvement cannot reasonably be expected to outlast the estate of the tenant. In all other cases a portion thereof only shall be paid by the tenant, while the remainder shall be paid by the remainderman. Such portion shall be ascertained by taking that percentage of the total which is found by dividing the present value of the tenant's estate by the present value of an estate of the same form as that of the tenant except that it is limited for a period corresponding to the reasonably expected duration of the improvement. The computation of present values of the estates shall be made on the expectancy basis set forth in the American Experience Tables of Mortality and no other evidence of duration or expectancy shall be considered.

History: En. Sec. 13, Ch. 277, L. 1959.

67-1914. Interpretation of act—uniformity. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 14, Ch. 277, L. 1959.

67-1915. Short title. This act may be cited as the Uniform Principal and Income Act.

History: En. Sec. 15, Ch. 277, L. 1959.

67-1916. Effective date—application to estates created after date. This act shall take effect upon its passage and approval and shall apply to all estates of tenants or remaindermen which become legally effective after that date.

History: En. Sec. 17, Ch. 277, L. 1959.

Compiler's Note

The approval date of Ch. 277, Laws 1959 was March 17, 1959.

TITLE 68

PUBLIC EMPLOYEES' RETIREMENT ACT

Chapter

1. Purpose of act—definitions, 68-101, 68-102.

2. Retirement system created—who are members, 68-201 to 68-203.

3. Contracts between municipal corporations, counties and public agencies, 68-301 to 68-303.

4. Cost of service, how borne—change of status—membership—retirement fund, 68-401 to 68-405.

. Board of administration—powers and duties, 68-501.

6. Prior service—allowance for—cost to cities, counties and public agencies, 68-601 to 68-603.

7. Management of retirement fund, 68-701.

- Retirement—compulsory—voluntary, 68-801, 68-802.
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- 10. Reinstatement—reduction of allowance—optional modification of allowances, 68-1001 to 68-1005.

11. Death benefits, 68-1101.

12. Benefits to whom paid, 68-1201.

13. Miscellaneous provisions, 68-1301 to 68-1320.

CHAPTER 1

PURPOSE OF ACT—DEFINITIONS

Section 68-101. Purpose of act—public employees' retirement system. 68-102. Definitions.

68-101. Purpose of act—public employees' retirement system. The purpose of this act is to effect economy and efficiency in the public service by providing a means whereby employees who become superannuated or otherwise incapacitated may, without hardship or prejudice, be replaced by more capable employees, and to that end providing a retirement system consisting of retirement compensation and death benefits.

History: En. Sec. 1, Ch. 212, L. 1945.

Schye, 130 M 537, 305 P 2d 350, 353; State ex rel. Morgan v. White, 136 M 470, 348 P 2d 991, 997.

References

State ex rel. Jardine v. Ford, 120 M 507, 188 P 2d 422, 423; State ex rel. Ebel v.

- **68-102. Definitions.** The following words and phrases used in this act, unless a different meaning is plainly indicated in the context, shall have the following meanings:
- (a) "Retirement system" shall mean the "public employees' retirement system" ereated by this act.
- (b) "Contracting city" shall mean any municipal corporation in the state which has elected to have all, or any part of its employees become a part of the retirement system and which has contracted with the board for such purpose.
- (c) "Contracting county" shall mean any county in the state which has elected to have all or any part of its employees become a part of the re-

tirement system and which has contracted with the board for such purpose. For the purpose of applying the provisions of this act to counties, wherever in this act reference is made to "city," "contracting city," "city employee," "city clerk," "municipal corporation," or "legislative body" of any city or municipal corporation, such words shall be construed to read, respectively, as "county," "contracting county," "county employee," "county clerk," "county" or "board of county commissioners" of any county.

- (d) "Public agency" shall mean any public district, local housing authority, or local authority, or public body whatsoever.
- (e) "Contracting public agency" shall mean any public agency in the state which has elected to have all or any part of its employees become a part of the retirement system and which has contracted with the board for such purpose. For the purpose of applying the provisions of this act to public agencies, whenever in this act reference is made to "city," "contracting city," "city employee," "city clerk," "municipal corporation," or "legislative body" of any city or municipal corporation, such words shall be construed to read, respectively, as "public agency," "contracting public agency," "public agency employee," "secretary of governing board or analogous authorized employee of the public agency," "public agency," or "governing board or head of a public agency not managed by a board."
- capacity whatever and whose salary is paid either by warrant of the state auditor and from the fees or income of any department or agency of the state, excepting all elective officers and persons directly appointed by the governor, who do not elect membership under the provisions of section 68-203, court commissioners, and members of any state board or commission who serve the state intermittently and are paid on a per diem basis (except as herein otherwise provided). "State employee" means further any employee under direct state supervision or functional state supervision as certified by the head of the state department concerned and approved by the board of administration of the public employees' retirement system, who is paid either fully or in part from federal funds, but is not subject to federal retirement system.
- (g) "Head of department" means the head of any department, institution or branch of the state service which directly pays salaries out of its income or which prepares, approves, and submits salary statements of its employees to the state board of examiners, state auditor and state treasurer for payment.
- (h) "Member" shall mean any person included in the membership of the retirement system set forth in section 68-202 and not excluded in section 68-203.
- (i) "Board" shall mean the "board of administration" created in this act.
- (j) "Retirement fund" shall mean the "public employees' retirement fund" created and established in section 68-405.
- (k) "State service" shall mean service rendered as an employee, hired or appointed, of the state or its university or any of the colleges, schools, components or units thereof for the purpose of this act, service rendered

as an employee of any contracting city for compensation, and, for the purposes of this act, a member shall be considered as being in "state service" only while he is receiving compensation from the state, or its university as aforesaid or the contracting city for such service, except as provided in subdivision (f) of section 68-501.

- (1) "Prison employee" for the purpose of the retirement system, means persons appointed by the warden of the state prison or by the state board of prison commissioners.
- (m) "Prior service" shall mean all state service rendered before the first day of July, 1945; and all state service rendered as an employee of a contracting city before the effective date of the city's participation in the retirement system, and allowable as provided in subdivision (h), section 68-501. Employees of a contracting city shall receive credit for prior service only if the election of the contracting city to participate in the Public Employees' Retirement Act is filed with the board on or before, but not after July 1, 1950. Notwithstanding the sentence preceding, "prior service" as applied to a person, employed by the state, including the university, who became a member while employed on a part-time basis, because of amendments to this retirement act, or as applied to a person who became a member prior to said amendments, because of a change in the employment status to a full-time basis, shall mean all state service rendered before the effective date of said membership.
- (n) "Continuous service" as applied to "prior service" shall mean all prior service, regardless of interruptions in such service, and as applied to service as a member shall mean uninterrupted employment in state service except as provided by subdivision (h) section 68-501, and, except that when for any cause whatever, a member discontinues state service but subsequently re-enters such service within three (3) years from the date of the discontinuance, such interruption shall not be deemed to break the continuity of service.
- (o) "Beneficiary" shall mean any person in receipt of a pension, annuity, retirement allowance, death benefit or any other benefit provided by this act.
- (p) "Compensation" shall mean the remuneration paid in cash out of funds controlled by the state, the university or the contracting city, plus the monetary value as determined by the board of administration, of living quarters, board, lodging, fuel, laundry and other advantages of any nature furnished by the state, the university, or the contracting city to a member, in payment for services.
- (q) "Compensation earnable" by a member shall mean the average monthly compensation as determined by the board upon the basis of the average time put in by members in the same group or class of employment and at the same rate of pay, it being assumed that during any absence said member was in the position held by him at the beginning of the absence: and provided that compensation received by a member subsequent to July 1, 1952, in excess of five thousand dollars (\$5,000.00) per annum may be used as a basis of compensation for the purpose of this retirement system if (a) he contributes normal contributions on the excess of such

salary subsequent to July 1, 1952, over five thousand dollars (\$5,000.00) to his individual account in the annuity savings fund and (b) he contributes three per cent (3%) of the excess of his salary subsequent to July 1, 1952, over five thousand dollars (\$5,000.00) to the pension accumulation fund of the retirement system.

- (r) "Final compensation" shall mean the average annual compensation earnable by a member during any three (3) consecutive years upon which normal contributions have been made, said years to be chosen by the member.
- (s) "Regular interest" shall mean the average interest earned on investments made hereunder, compounded at each June thirtieth, subject to subdivision (j) section 68-501 plus such additional interest as the board may credit from year to year in accordance with the provisions of this act.
- (t) "Normal contributions" shall mean contributions by members under the provisions of section 68-701 (g) to (n), both inclusive.
- (u) "Additional contributions" shall mean contributions by members under the provisions of section 68-701(k).
- (v) "Accumulated normal contributions" shall mean the sum of all the normal contributions standing to the credit of a member's individual account, together with the regular interest thereon.
- (w) "Accumulated additional contributions" shall mean the sum of all the additional contributions standing to the credit of a member's individual account, together with the regular interest thereon.
- (x) "Accumulated contributions" shall mean accumulated normal contributions plus any accumulated additional contributions standing to the credit of a member's account.
- (y) "Pension" shall mean payments for life derived from contributions made from the state controlled funds, or in the case of members from contracting cities from the funds of such cities, as provided in this act.
- (z) "Annuity" shall mean payments for life derived from contributions made by a member as provided in this act.
 - (aa) "Retirement allowance" shall mean the pension plus the annuity.
- (ab) "Death allowance" shall mean payments for life, or until remarriage, or until the youngest child shall attain the age of eighteen (18) years, as provided in section 68-1101.
- (ac) "Actuarial equivalent" shall mean a benefit of equal value when computed upon the basis of such mortality tables as shall be adopted by the board, and interest at a rate to be annually determined by the retirement board compounded annually, subject to subdivision (j), section 68-501.
- (ad) "Retirement" shall mean withdrawal from active service with a retirement allowance granted under the provisions of this act.
- (ae) "Disability" and "incapacity for performance of duty" referred to herein as a basis of retirement, shall mean disability of permanent duration or disability of extended and uncertain duration, as determined by the board on the basis of competent medical opinion.
- (af) "Actuary" shall mean the actuary regularly and continuously employed on a full or part-time basis, by the board of administration.

- (ag) "Benefit" shall be the retirement allowance, death allowance, death benefit or refund of accumulated contributions provided by this act.
- (ah) "Fiscal year" shall mean any year commencing with July first and ending June thirtieth next following.

History: En. Sec. 2, Ch. 212, L. 1945; amd. Sec. 1, Ch. 297, L. 1947; amd. Sec. 1, Ch. 186, L. 1951; amd. Sec. 1, Ch. 92, L. 1955; amd. Sec. 1, Ch. 246, L. 1959.

Subdivision (f)

The legislature by using the words "excepting as herein otherwise provided" has provided a means for all elective

officers and all persons directly appointed by the governor to become members of the system through section 68-203. Corwin v. Bieswanger, 126 M 337, 251 P 2d 252, 253.

References

State ex rel. Jardine v. Ford, 120 M 507, 188 P 2d 422, 423.

CHAPTER 2

RETIREMENT SYSTEM CREATED—WHO ARE MEMBERS

Section 68-201. Public employees' retirement system created.

68-202. Members—re-entry into state service—school district employees.

68-203. Who are ineligible to membership in system.

68-201. Public employees' retirement system created. A retirement system is hereby created and established to become effective July 1, 1945, and to be known as the "public employees' retirement system."

History: En. Sec. 3, Ch. 212, L. 1945.

- 68-202. Members—re-entry into state service—school district employees. (a) From and after July 1, 1955. All employees shall become members on the first day of employment.
- (b) Every employee who re-enters state service shall become a member unless he has had an original election of exemption from membership and his state service was not interrupted by a break of more than one (1) month. A seasonal employee who has had an original election of exemption from membership will not be subject to the requirement regarding the break in service while continuing in his original employment and employed on a seasonal basis, but upon termination of employment to accept new employment or absence of more than one (1) month in returning to original employment in any ensuing season, such a seasonal employee shall become a member of the retirement system upon re-entry.
- (c) Time during which an employee of a school district is absent from state service during official vacation shall be counted as service in determining eligibility for membership under this act.

History: En. Sec. 4, Ch. 212, L. 1945; amd. Sec. 2, Ch. 186, L. 1951; amd. Sec. 2, Ch. 92, L. 1955.

References

Corwin v. Bieswanger, 126 M 337, 251 P 2d 252, 253.

- **68-203.** Who are ineligible to membership in system. The following employees shall not become members of the retirement system:
- (a) Elective officers, other than elective officers who filed with the board of administration an election in writing to become members; provided, that any person so excluded from membership, who later becomes a member hereof, shall have the option of making contributions to the

retirement system in the amount which he would have contributed had he not been so excluded, and he shall then receive credit for prior service in the same manner as if he had not been so excluded. If he shall affirmatively exercise the option, the contributions of the state, or the contracting city because of his membership, shall be the same as they would have been had he not been so excluded.

- (b) Inmates of state institutions who are allowed compensation for such service as they are able to perform.
- (c) Persons in state institutions principally for the purpose of training, but who receive compensation.
 - (d) Independent contractors who are not employees.
- (e) Employees serving in employment which does not exceed the equivalent of sixty (60) working days in any fiscal year.
- Persons in state service on July 1, 1945, or prior thereto who filed with the board of administration an election not to become members, provided any person so excluded from membership by his own election may on or before, but not after, July 1, 1948, file with the board of administration an election to become a member and receive credit for prior service, and shall become a member of the retirement system on the date of filing such election. Such person shall receive credit for prior service only if his election to become a member is filed with the board on or before, but not after July 1, 1948, and shall have the option of paying to the retirement system all or part of the amount which he would have contributed had he not been so excluded but had been a member to and including the date of filing such election to become a member, plus interest which would have accumulated thereon through such date. Upon the retirement of such person under section 68-801, the pensions provided by contributions of the state under this act shall be the same as if such person affirmatively exercised the option to pay to the retirement system all of that amount with accumulated interest.
- (g) Persons directly appointed by the governor, who do not file with the board of administration an election in writing to become members.
- (h) Persons who are members of any other retirement or pension system supported wholly or in part by funds of the United States government, any state government or political subdivision thereof and who are receiving credit in such other system for service, it being the purpose of this section to prevent a person from receiving credit for the same service in two (2) retirement systems supported wholly or in part by public funds, and no person shall receive such credit under any circumstances. Any member of the retirement system who, because of his employment by the state, shall be required to become a member of any such other systems, shall be considered solely for the purposes of section 68-701 (m) as permanently separated from state service. The accumulated contributions of any member who shall have died after becoming a member of such other system and before receiving said accumulated contributions, shall be paid to the beneficiary nominated by him to receive any death benefit payable under section 68-1101. Contributions to the retirement fund under section 68-1307 on the basis of compensation earned by members after the effective

date of termination of membership herein because of the membership in such other system, shall be repaid to the fund from which said contributions were made. For the purpose of this section, persons who merely are receiving pensions or retirement allowances, or other payments, from any source whatever, on account of service rendered to some other agency than the state and when such persons were not in state service, shall not be considered, because of such receipt, members of any other retirement or pension system.

- (i) Appointive members of boards and commissions who serve the state or contracting agency on an intermittent basis, and who are paid on a per diem basis.
- (j) Persons who become public employees under the meaning of this act after they have reached their sixtieth (60) birthday and have no creditable service in this system, and who do not file with the board of administration an election to become members.

History: En. Sec. 5, Ch. 212, L. 1945; amd. Sec. 2, Ch. 297, L. 1947; amd. Sec. 3, Ch. 92, L. 1955; amd. Sec. 2, Ch. 246, L. 1959.

Membership

As to elected officers and persons directly appointed by the governor the

Public Employees' Retirement Act provides that they may elect to become members by complying with the provisions of subdivisions (a), (f) and (g) hereof. Corwin v. Bieswanger, 126 M 337, 251 P 2d 252, 253.

CHAPTER 3

CONTRACTS BETWEEN MUNICIPAL CORPORATIONS, COUNTIES AND PUBLIC AGENCIES

Section 68-301. Contracts between municipal corporations, counties and public agencies. 68-302. Counties, by contract with board of administration, may participate. 68-303. Other public agencies in state may, by contract with board, participate.

- 68-301. Contracts between municipal corporations, counties and public agencies. After receiving from the board of administration, a quotation of the approximate contribution provided for in section 68-602, any municipal corporation in the state may participate in the public employees' retirement system, making its employees members of said system, by contract entered into between the legislative body of said municipal corporation and the board of administration of the said retirement system, subject to the provisions of this act. Said contract may include any provisions consistent with this act, necessary in the administration of the retirement system as it affects said employees and municipal corporation. The approval and termination of said contract shall be subject to the following provisions, in addition to the other provisions of this act:
- (a) Said legislative body shall adopt a resolution giving notice of intention to approve said contract, which resolution shall contain a summary of the major provisions of the proposed retirement system. Such contract shall not be approved unless and until an election has been held to permit the employees proposed to be included in the retirement system to express, by secret ballot, their approval or disapproval of said retirement proposal. The ballot at such election shall include the summary of the retirement

system as set forth in the foregoing resolution. The election shall be conducted in such manner as to permit the city employees proposed to be included in the system separately to express their approval or disapproval thereof. Said election shall be conducted in such manner as shall be prescribed by the legislative body of the city. Approval of the contract shall be by ordinance adopted by the affirmative vote of two-thirds (2/3) of the members of said legislative body, not less than twenty (20) days after the adoption of said resolution, or by an ordinance adopted by a majority vote of the electorate of the city voting thereon. The legislative body shall not include in the retirement system any of the city employees above mentioned, a majority of whose members voted to disapprove the proposed system.

- (b) Said municipal corporation shall include under said contract all of its employees, except as exclusions in addition to the exclusion specified in this act, may be agreed to between it and the board of administration, said exclusions to be based on groups of employees such as by departments, by duties or by age, and not by individual employees. The board of administration, however, shall have the right to disapprove the exclusion of any group, if in its opinion said exclusion affects adversely the interest of said retirement system. Membership in the retirement system shall be compulsory for all employees included under said contract.
- c(c) Errors in said contract may be corrected through amendments approved by the adoption of suitable resolutions by the contracting parties. Excluded employees may be included under said contract, by groups, through amendments to said contract approved in the manner prescribed in this section for the approval of contracts. Additional benefits on account of prior services, provided in this act but not included in said contract, may be included in said contract, through amendments approved in the manner prescribed in this section for the approval of contracts, except that an election among employees shall not be required.

History: En. Sec. 6, Ch. 212, L. 1945.

68-302. Counties, by contract with board of administration, may participate. Any county in this state may participate in the public employees' retirement system, making all or some of its employees members of such system by contract entered into between the board of supervisors of such county and the board of administration of the retirement system. The provisions of this act relating to cities, employees of cities, the entering into contracts between cities and the board, the method of computing benefits and the benefits payable to city employees, and all other provisions of this act which relate to cities which elect to include employees under the public employees' retirement system shall also apply to counties in the same manner to the same extent, and with the same effect as if counties instead of cities were expressly referred to in such provisions.

History: En. Sec. 7, Ch. 212, L. 1945.

68-303. Other public agencies in state may, by contract with board, participate. Any public agency in this state, which is not already authorized to do so, may participate in the public employees' retirement system, making all or some of its employees members of said system, by contract

entered into between the governing board or head of such agency, and the board of administration of the retirement system. The provisions of this act relating to cities, employees of cities, the entering into contracts between cities and the board, the method of computing benefits, and the benefits payable to city employees, and all other provisions of this act, which relate to cities which elect to include employees under the public employees' retirement system, shall also apply to public agencies in the same manner, to the same extent, and with the same effect, as if public agencies, instead of cities, were expressly referred to in such provisions.

History: En. Sec. 8, Ch. 212, L. 1945.

CHAPTER 4

COST OF SERVICE, HOW BORNE—CHANGE OF STATUS—MEMBERSHIP—RETIREMENT FUND

Section 68-401. Cost of service of member borne by employing subdivision.

68-402. Change of status.

68-403. Monthly reports of change of status of members.

68-404. Termination of membership.

68-405. Fund created.

68-401. Cost of service of member borne by employing subdivision. An employee of the state or a contracting city shall receive credit, subject to the provisions of this act, for all service rendered by him as an employee of the state or a contracting city, and the cost of benefits based on such service shall be borne by the respective employers in whose service it was rendered, unless the termination of employment by the state or a contracting city is followed by entry into employment by the state if the previous employment was by a contracting city, or contracting city if the previous employment was by the state or a different contracting city, more than one (1) year after such termination, in which event service as applied to a member who is an employee of the state or an employee of a contracting city, shall be limited to service rendered as an employee of the state or of the contracting city, as the case may be. If a person is employed concurrently by more than one contracting city, or by the state and one or more contracting cities, his status under the retirement system shall be determined in the same manner as if he were employed in more than one office or department of the state.

History: En. Sec. 9, Ch. 212, L. 1945; amd. Sec. 3, Ch. 186, L. 1951.

68-402. Change of status. It shall be the duty of the head of each office or department of the state, other than the university, to give immediate notice in writing to the board of administration of the change in status of any member in his office or department resulting from transfer, promotion, leave of absence, resignation, reinstatement, dismissal or death. The head of each such office or department shall furnish such other information concerning any member as the board may require. The registrar of the university, or such other official as the university may designate, shall furnish monthly reports to the board of administration showing changes in

the status of any and all members employed by the university during the preceding month, and shall furnish such additional information concerning any or all such members as the board may require in the administration of the retirement system.

History: En. Sec. 10, Ch. 212, L. 1945.

68-403. Monthly reports of change of status of members. The chief administrative officer of a contracting city, or other such person as the legislative body of the city may designate, shall furnish monthly reports to the board of administration showing changes in the status during the preceding month of any and all members who have been included under the retirement system by the city, and shall furnish such additional information concerning any or all of such members as the board may require in the administration of the retirement system, and further, shall furnish such services of its offices and departments as the board may request in connection with claims by said members against the system.

History: En. Sec. 11, Ch. 212, L. 1945.

68-404. Termination of membership. Each member and each person retired shall be subject to all provisions of this act and to the rules and regulations adopted by the board of administration. Any person who is retired and any person who is credited with less than ten (10) years of public service and who renders less than five (5) years of service in any period of ten (10) consecutive years, or withdraws more than one-fourth $\binom{1}{4}$ of his normal contributions, ceases to be a member.

History: En. Sec. 12, Ch. 212, L. 1945; amd. Sec. 3, Ch. 297, L. 1947.

68-405. Fund created. A fund is hereby created and established to be known as the "public employees' retirement fund" and shall consist of all the cash, securities or other assets paid into it in accordance with the provisions of this act. All contributions paid into said fund as the employer agency portion from the state, counties, cities, towns, school districts or other public agencies or political subdivisions shall constitute a pooled or mingled fund for payment of all claims made and approved.

History: En. Sec. 13, Ch. 212, L. 1945; amd. Sec. 4, Ch. 297, L. 1947.

CHAPTER 5

BOARD OF ADMINISTRATION—POWERS AND DUTIES

Section 68-501. Board of administration.

68-501. Board of administration. The board of administration shall consist of five (5) members appointed by the governor, three (3) of which members shall be public employees and shall be members of the retirement system, and two (2) of which shall be members at large. Terms of office shall be for five (5) years provided, however, that those first appointed after this act takes effect shall be for terms, respectively, of one (1), two (2), three (3), four (4), and five (5) years but their successors shall hold

office for terms of five (5) years; provided not more than one (1) employee member of the retirement board shall be an employee of the same department, bureau or agency of the state or contracting public agency. Members of the board shall be paid their actual and necessary expenses and those members of the board who are not members of the public employees' retirement system shall be entitled to receive in addition to actual and necessary expenses compensation at the rate of ten dollars (\$10.00) per day.

The attorney general is hereby designated legal counsel for the board.

- (a) Vacancy on board—how filled. Any vacancy occurring ninety (90) days or more before the expiration of the term of any member of the retirement board shall be filled by appointment by the governor. The person thus appointed shall serve for the remainder of the unexpired term.
- (b) The board may establish such rules and regulations as it deems proper, within the limitations of this act and for its proper administration, operation and enforcement. The board shall elect one (1) of its members president, and shall appoint and fix the compensation of a secretary who shall have the power to administer oaths, and other necessary employees. It shall maintain its office in the city of Helena. A quorum of the board shall be three (3) members. The board may appoint a committee of one or more of its members, which shall have authority to perform routine acts, such as retirement of members and fixing of retirement allowances, approval of death claims and correction of records necessary in the administration of the system in accordance with the provisions of this act and rules and regulations of the board. All expenses of the administration of this act in excess of amount provided by the one dollar (\$1.00) membership fee shall be a charge on the appropriation made from the general fund of the state.
- (c) The board shall determine who are employees within the meaning of this act and shall be the sole authority and judge under this act as to the conditions under which persons may be admitted to and continue to receive benefits under the retirement system, and shall have exclusive control of the administration and investment of the fund. As soon as practical after the close of each fiscal year, the board shall file with the governor a report of its work for such fiscal year.
- (d) Subject to the following and to all other provisions of this act, and such rules and regulations as it may adopt in pursuance thereof, the board shall determine and may modify allowances for service and disability.
- (e) The board of administration shall fix and determine how much service rendered in any fiscal year shall be the equivalent of a year of service and parts thereof, but shall credit one (1) year for two hundred and fifty (250) or more days of service rendered by employees on a per diem basis and one (1) year for ten (10) months or more of service rendered by employees on a monthly basis, but not more than one (1) year for all service in any fiscal year. In determining the credit to be granted for service rendered on a part-time basis, for purposes of calculating retirement allowances, the service shall be reduced to a full-time basis

according to the service required, in the next preceding sentence, for credit for one (1) year of service. In calculating benefits based on service so determined, except in calculating the additional pension provided in subdivision (g) of section 68-901 compensation earnable shall be taken as the compensation which would be earnable if the employment had been on a full-time basis, and with a compensation derived by multiplying the member's compensation by ratio of full time to the time he was required by his employment to engage in his duties. In calculating the credit to be granted for service rendered on a part-time basis, for purposes of determining qualifications for retirement, and of calculating benefits payable upon death before retirement, the service required in this paragraph for credit for a year of service shall not be used, but instead, a year of service shall be credited for each year during which the member was employed throughout the year on a part-time basis and was engaged in his duties the full amount of time he was required by his employment to be so engaged. Credit for fractional years will be granted to the extent of the fraction derived by dividing the time during which the member was engaged in his duties within the year, by the time he was required by his employment to be so engaged.

Time during which a member is absent from public service without compensation shall not be allowed in computing service; except that time during which a member is absent from public service by reason of having been ordered on duty with the armed forces of the United States, or by reason of voluntary service by the member in said forces or on ships operated by or for the United States government, either during a war involving the United States as a belligerent or in any other national emergency, and for ninety (90) days thereafter shall be considered as time spent in public service, for the purpose of qualification for retirement and death benefits, but not for calculation of retirement benefits unless the member elects to contribute and contributes under the retirement system. Any member so absent and until his return within the said ninety (90) days may resign from the system. Any member so absent shall have the right to contribute to said system, either during his service with the armed forces of the United States or in the merchant marine of the United States, and ninety (90) days thereafter or upon his return to the state service, at times and in a manner fixed by the board of administration, amounts equal to the contribution which would have been made by him to the system on the basis of his compensation earnable at the commencement of his absence. If he does so contribute he shall receive credit for public service for such time in the same manner as if he had not been absent from public service. Whenever a member elects to continue his contributions, the state or the contracting city, or county or other agency shall thereupon contribute an amount equal to that which it would have contributed under section 68-1307 or under the contract between the board and the legislative body, as the case may be, if the member had not been absent from state service.

Any member so absent or any member absent from state service by reason of having been ordered by an authorized official of the state of Montana or the United States, to duties outside state service shall be paid upon his request, his accumulated contributions. Such payment shall terminate any election by said member under this section to contribute.

Time during which a member is absent from public service by reason of injury or illness determined within one (1) year after the end of such absence as arising out of and in the course of his employment, shall be considered as spent in public service, for the purpose of qualification for retirement and death benefits, but not for the calculation of retirement benefits, except as he received compensation, as defined in this act and as distinguished from disability indemnity under the Workmen's Compensation Act during the absence, and then only to the extent of compensation received.

- (g) Each employee shall file with the board of administration such information affecting his status as a member of the retirement system as the board may require.
- (h) Credit for prior service shall be granted to each person other than persons who are employees of the university or of a contracting city at the time of becoming members of the retirement system, who has rendered such service as defined in this act, and who has become a member of the retirement system on January 1, 1946, or within three (3) years after last rendering prior service. Credit for prior service shall be granted to each person who is employed by the university at the time of becoming a member of the retirement system regardless of whether he had been retired under the system prior to the effective date hereof, who has rendered such service as defined in this act, and who has become a member of the retirement system on January 1, 1946, or within three (3) years after last rendering prior service.

Credit for prior service shall be granted to each person who is employed by a contracting city at the time of becoming a member of the system, who has rendered such service as defined in this act, and who has become a member of the retirement system within three (3) years after last rendering prior service. Notwithstanding the three (3) sentences next preceding, credit for prior service shall be granted to each person employed by the state including the university, who became a member while employed on a part-time basis, because of amendments to this retirement act, or who became a member prior to said amendments, because of a change in status to a full-time basis. The credit for prior service to be granted persons employed by a contracting city who are included under the retirement system shall be established by contract between the board and the legislative body of such city; and such credit as may be granted to a person shall be in the form of a percentage, not to exceed the analogous percentage applicable to employees of the state, for each year of prior service. Prior service so credited shall be the basis for a retirement allowance or benefit as provided in this act only if the membership in the retirement system continues unbroken until retirement or retirement allowance or until the granting of such other benefit; provided, that termination of membership by withdrawal of accumulated contributions followed by the redeposit of such contributions upon re-entrance into public service as herein provided shall not constitute a break in membership, but this section shall not be construed to entitle any person to credit as prior

service for time during which he was not in public service as defined in this act.

Credit for any prior service, not previously granted, shall be granted to a member upon request for retirement provided that the member has a total of not less than ten (10) years of creditable state service of which not less than three (3) years have been as a contributing member of the retirement system and the retirement allowance does not include credit for all state service prior to July 1, 1945, or in the case of a contracting city prior to the date of the contract, or July 1, 1947, whichever is earlier. Proper certification of such service must be furnished.

- (i) The management and control of the retirement system shall be vested in the board of administration, and it shall exercise the following powers and perform the following duties:
- The board of administration shall keep in convenient form such data as shall be necessary for the actuarial valuation of the retirement fund created by this act. On July 1, 1946, and at the end of every two-year period thereafter, it shall cause to be made an actuarial investigation into the mortality, service and compensation experience of the members and beneficiaries under the provision of this act, and shall further cause to be made an actuarial valuation of the assets and liabilities of the public employees' retirement fund herein created, and from time to time shall determine the rate of interest being earned on the said retirement fund. Upon the basis of any or all of such investigation, valuation, and determination, said board shall adopt such mortality, service and other tables and such interest rate, in lieu of the interest rate specified herein, or any of such items as it shall deem necessary, and shall make such revision in rates of contributions of members as it may deem necessary to comply with the provisions of section 68-701. No adjustment shall be included in the new rates for time prior to the effective date of such revision.
- (k) The board shall credit contributions of members of the state and contracting cities with interest at the rate being used under the system on the effective date hereof, compounded each June 30, subject to the foregoing subdivision (j) of section 68-501. At the end of each fiscal year, beginning with the second fiscal year of the operation of the retirement system, it may credit to all contributions held in the retirement fund on June 30 of the then current fiscal year, such interest in excess of said rate provided herein as it may deem proper in the light of the earnings of the retirement fund during such fiscal year, but such additional interest credited during any fiscal year shall not be greater than the excess of said earnings over the interest otherwise credited to contributions during that year. Interest at said rate, compounded annually, subject to said foregoing subdivision (j) hereof, shall be used in the calculation of benefits under any mortality table adopted by the board, regardless of any additional interest allowed on contribution under this paragraph.

In addition to other records and accounts, it shall keep such records and accounts as may be necessary to show at any time:

The total accumulated contributions of members.

The total accumulated contributions of retired members less the annuity payments made to such members.

The accumulated contributions of the state and of contracting cities held for the benefit of members on account of service rendered as members of the retirement system.

All other accumulated contributions of the state and of contracting cities which shall include the amounts available to meet the obligation of the state and of the contracting cities, respectively on account of benefits that have been granted to retired employees and on account of prior service of members.

(1) In addition to rendering the annual report to the governor required by subsection (c) of this section, it shall cause to be published annually a financial statement showing an actuarial valuation of the assets and liabilities of the retirement system created by this act and a statement as to the accumulated cash and securities in the retirement fund as certified by the state auditor, but until all prior service is verified, the board of administration may omit from the financial statement published annually, assets and liabilities resulting from such prior service, and may include assets and liabilities on account of service rendered as members in amounts equal only to accumulated contributions held on account of such service.

History: En. Sec. 14, Ch. 212, L. 1945; amd. Sec. 5, Ch. 297, L. 1947; amd. Sec. 4, Ch. 186, L. 1951; amd. Sec. 1, Ch. 224, L. 1951; amd. Sec. 1, Ch. 225, L. 1953; amd. Sec. 4, Ch. 92, L. 1955.

Subd. (h) Retroactive

Under the amendment by chapter 224 of Laws 1951, subsection (h) is retroactive and a person who retired in 1949 is entitled to a credit for his service prior to January 1, 1945 and his increase in the retirement pension would be from the date of his retirement not just the date that chapter 224 of Laws 1951 went into effect. Davidson v. Love, 127 M 366, 264 P 2d 705. (See, however, dissenting opinion, 127 M 366, 264 P 2d 705, 708.)

References

State ex rel. Ebel v. Schve, 130 M 537, 305 P 2d 350, 353.

CHAPTER 6

PRIOR SERVICE—ALLOWANCE FOR—COST TO CITIES, COUNTIES AND PUBLIC AGENCIES

Section 68-601. Prior service of city, county and public agency employees.

68-602. Cost to cities, counties and public agencies.

Contribution to be made by contracting city.

68-601. Prior service of city, county and public agency employees. board of administration is hereby empowered to make arrangements with any contracting city for the payment of the prior service liability as computed by the actuary, on such terms as the financial conditions of the contracting city will permit. Should the legislative body of any city having an existing retirement, pension or annuity fund or system, hereafter referred to as the local system, desire to make all or part of the members of the local system members of the public employees' retirement system, it may enter into a contract for that purpose with the board of administration in the manner provided in section 68-301 and section 68-602; provided, however, that the employees voting as provided in subdivision (a) of section 68-301 shall be limited to active members of the local system voting as a unit, and approval shall require a two-thirds vote of such employees.

All members of the local system included in said contract shall become members of said employees' retirement system, and shall no longer be members of the local system, and the provisions of this act shall also apply, except that the existing pensions being paid to pensioners or annuitants of the local system on the date of the approval shall be continued and paid at their existing rates by the public employees' retirement system and the liability on this account shall be included in the computation of the prior service liability by the actuary as provided for herein. Subject to the approval of the board of administration, as for all other employees, the contracting city may elect to continue the local system and to place under the retirement system only a portion of the members of the local system. Any cash and securities to the credit of the local system and held on account of persons who become members of the public employees' retirement system, shall be transferred to the said system as of the date of the approval, the value at which said securities shall be credited to the contracting city, being determined by the board of administration.

The trustees or other administrative head of the local system as of the date of the approval, shall certify the proportion, if any, of the funds of the system that represents the accumulated contributions of the members. and the relative shares of the members as of that date. Such shares shall be credited to the respective individual accounts of such members in the Montana public employees' retirement system, and administered as if said contributions had been made during membership in said system, except that the annuity provided by said contributions with accumulated interest shall be deducted from the pension which otherwise would be payable on account of prior service. The total of the funds transferred to the Montana public employees' retirement system shall be offset against the prior service liability before determining the contribution to be paid by the contracting city as provided herein. If all the members of the local system become members of the retirement system, the operation of the local system shall be discontinued as of such date as is provided for in the contract between the board and the legislative body of the contracting city.

History: En. Sec. 15. Ch. 212, L. 1945.

Cost to cities, counties and public agencies. When the legislative body of a municipal corporation desires to consider the participation of said municipal corporation in the retirement system, said body shall ask the board of administration for a quotation of the approximate contribution to the retirement system which would be required of the municipal corporation because of such participation. Said approximate contribution quoted by the board and the definitive contribution certified by the board as provided in section 68-603 shall be determined by actuarial valuations of the prior and future service liability under the retirement system, on account of employees of such municipal corporation whose memberships are contemplated, in the determination of the approximate contribution, or who become members, in the determination of the definitive contribution, in the same manner as the contribution required of the state on account of its employees was originally determined; provided, that in consideration of the number of employees of the municipal corporation or other circumstances, a different manner of determining said contribution may be adopted by the board, upon recommendation of the actuary. The approximate and definitive contributions are similar to premiums under insurance policies. Said approximate contribution shall be quoted by the board to the municipal corporation, subject to the understanding that the definitive contribution certified by the board after the approval of a contract as provided in section 68-603, may differ from said approximate contribution because of (1) change in number or salaries of employed included; (2) change in prior service benefits; (3) time elapsed between said quotation and effective date of said contract; (4) change in effective date of membership; (5) change in manner of determining contribution; and (6) any other changes in the facts or assumptions upon which said determination was based.

It shall be the duty of the municipal corporation to furnish to the board of administration such data about its employees as the board may deem necessary for such valuations including an investigation into the experience among said employees. It shall also be the duty of the municipal corporation, at the option of the board of administration, to have such valuations and the investigation and valuations required by section 68-501 with respect to its employees, made through a consulting actuary and the municipal corporation, said contract to be subject to the approval of the board, and said valuations to be under the direction of the actuary of the retirement system. The services under said contract shall be deemed services rendered to the municipal corporation and not to the state.

The board of administration, however, may elect to have such valuations made in its office under the direction of the actuary of the retirement system, in lieu of having said valuations made through a consulting actuary. Regardless of how such valuations are made, all data in connection therewith, including work sheets, final results, and reports from said consulting actuary, shall be the property of the board of administration and shall be delivered to said board at the conclusion of said valuations. The expense of determining initially such approximate and definitive contributions, and of the investigation and valuation required by subdivision (j) of section 68-501 with respect to its employees, shall be assessed against and paid by the municipal corporation on whose account it is incurred, said payment being made directly to said consulting actuary for services rendered under said contract and directly to the board of administration for services rendered by its employees. The board may include each year in the contribution required of the contracting city, a reasonable amount which may differ from city to city as determined annually, to cover the costs of administering the system as it affects the active and retired employees of said city. such payments made to the board of administration by municipal corporations shall be credited to the current appropriation for support of the board and available for expenditure by the board.

History: En. Sec. 16, Ch. 212, L. 1945.

68-603. Contribution to be made by contracting city. The contracting city participating in the system as provided in this act, shall make such contribution to the retirement system, on account of its approval of the participation of its employees in the public employees' retirement system, as may be recommended by the actuary, in either or both fixed sums or percentage of total compensation of said employees who are members,

approved by the board of administration and certified by said board to the legislative body of the contracting city, said contribution being also referred to herein as definitive contribution. Said definitive contribution shall be subject to such adjustment as may be necessary on account of any additional prior service credits which the contracting city may desire awarded to employees of such contracting city or on account of experience under the system as determined by the periodical investigation, valuation and determination provided for in subdivision (i) of section 68-501. Said contribution shall be paid to the retirement system at times and in the manner provided in the contract between the system and the contracting city. The legislative body of said contracting city shall budget in each fund, from which compensation for personal services are paid in whole or in part, an amount sufficient to pay the contributions required to the retirement system, and, if moneys are not available in such funds from general revenue sources in sufficient amount for that purpose, shall have authority to budget, levy and collect annually a special tax upon the assessable property within the city in the number of cents per one hundred dollars (\$100.00) of assessable property as will be sufficient to raise the amount estimated by the said legislative body to be required to provide sufficient revenue to meet the obligation of the city to the retirement system under this section and under section 68-301; which said rate of taxation may be in addition to the annual rate of taxation allowed by law to be levied in said city. Any person who is a member or beneficiary of the retirement system on account of the participation of said contracting city, shall have the right to maintain appropriate action or proceeding to require performance of the duty imposed on said legislative body by this section and section 68-301.

History: En. Sec. 17, Ch. 212, L. 1945.

CHAPTER 7

MANAGEMENT OF RETIREMENT FUND

Section 68-701. Management of retirement fund.

- 68-701. Management of retirement fund. The retirement fund shall be managed as follows:
- (a) The board of administration shall have exclusive control of the administration of said fund except as otherwise provided.
- (b) The said fund shall be invested by the state board of land commissioners as part of the long term investment fund.
- (c) The board of administration shall deposit monthly in the state treasury all amounts received by it as provided in this section and section 68-1307.
- (d) The state treasurer shall be custodian of the retirement fund, subject to the exclusive control of the board of administration as to the administration thereof and the state board of land commissioners as to the investment thereof. All payments from said fund shall be made by him only upon vouchers signed by two (2) board members designated by the board of administration. A duly attested copy of a resolution of the board of administration designating such persons and bearing on its face

specimen signatures of such persons shall be filed with the treasurer as his authority for making payments upon such vouchers. No voucher shall be drawn unless it has previously been authorized by resolution of the board of administration.

- (e) Interest earned on any cash deposit in a bank by the state treasurer and income on other assets constituting a part of the said fund shall be paid into said fund as received. Income, of whatever nature, earned on the retirement fund during any fiscal year, in excess of the interest credited to contributions during said year shall be retained in said fund as a reserve against deficiencies in interest earned in other years, losses under investments, and other contingencies.
- (f) Except as herein provided, no member and no employee of the board of administration shall have any interest direct, or indirect, in the making of any investment, or in the gains of [or] profits accruing therefrom. And no member or employee of the said board directly or indirectly, for himself or as an agent or partner of others, shall borrow any of its funds or deposits, nor shall any such member or employee in any manner use the same except to make such current and necessary payments as are authorized by said board; nor shall any member or employee of said board become an endorser or surety as to, or in any manner an obligor for investments by the board.
- (g) The normal rates of contribution of members shall be based on sex and the age at the nearest birthday at the time of entrance into the retirement system. The normal rates of contribution shall be such as will provide an average annuity at age sixty-five (65) equal to one one hundred-fortieth (1/140) of the final compensation of members, according to the tables adopted by the board, for each year of service rendered after entering the system. Nothing in this section shall prevent the adoption of one (1) schedule of rates for males and one (1) schedule for females.
- (h) The actual amount of annuity receivable by any member upon retirement shall be the actuarial equivalent of his accumulated contributions, as provided in subdivisions (a) and (k) of section 68-1307.
- From and after July 1, 1955, the board of administration shall certify to the head of each office or department of the state and to the registrar of the university the normal rate of contribution as provided in this act for each member in such office, department, or the university, respectively. The head of each office or department of the state shall apply such rate of contribution to the compensation of each member, and shall certify to the state auditor on each and every payroll the amount to be contributed and shall furnish immediately to the board of administration a copy of each and every such payroll; and each such amount shall be deducted by the head of each office or department and shall be remitted to the board. The registrar of the university shall apply the rate of contribution certified to him by the board to the compensation of each member employed by the university and the contributions so determined shall be deducted by the registrar of the university from the compensation of each such member; each such amount shall be remitted to the board and the registrar of the university shall furnish to the board a copy of each and every salary roll and payroll from which such amounts have been deducted.

Each contribution deducted and remitted to the board shall be credited by the board, together with regular interest, to an individual account of the member for whom the contribution was made. Payment of salaries or wages less such contribution shall be full and complete discharge and acquittance of all claims and demands whatsoever for the service rendered by members during the period covered by such payment, except their claims to the benefits to which they may be entitled under the provisions of this act.

- From and after July 1, 1955, the board of administration shall (i) certify to the city clerk, or other officer designated by the legislative body, of each contracting city the rate of contribution as provided in this act for each member included under the retirement system respectively. city clerk, or other officer, shall apply the rate of contribution certified to him by the board to the compensation of each member included in the retirement system and the contribution so determined shall be deducted by the city clerk, or other officer, from the compensation of each such member; each such amount shall be remitted to the board and the city clerk or other officer, shall furnish to the board a copy of each and every salary roll and payroll from which such amounts have been deducted. Each contribution deducted and remitted to the board shall be credited by the board, together with regular interest, to an individual account of the member for whom the contribution was made. Payment of salaries or wages less such contribution shall be full and complete discharge and acquittance of all claims to the benefits to which they may be entitled under the provisions of this act.
- (k) Subject to the rules and regulations to be established and promulgated by the board of administration, any member may elect to contribute at rates in excess of those provided for in subsection (i) and (j) of this section of this act, for the purpose of providing additional benefits, but the exercise of this privilege by a member shall not place on the state or contracting city any additional financial obligation. The provisions of subdivision (f) and (g) of section 68-203 shall apply also to additional contributions. The board, upon application shall furnish to such member information concerning the nature and amount of additional benefits to be provided by such additional contributions.
- (1) In addition to the contributions hereinbefore provided to be paid by employees who are members of the retirement system created by this act, every such employee shall pay an annual membership fee of one dollar (\$1.00) which amount, together with other moneys appropriated for that purpose, shall be used for the support of the board of administration.
- (m) From and after July 1, 1955, should the state service of a member be discontinued otherwise than by death or retirement, he shall after the date of discontinuance, be paid such part of his contributions as he demands. The board may, in its discretion, withhold for not more than one (1) year after a member last rendered state service, all or part of his contributions if after a previous discontinuance of state service he withdrew all or part of his contributions and failed to redeposit such withdrawn amount in the retirement fund as provided in subsection (n).

Any member with ten (10) or more years of service, whose service is discontinued otherwise than by death or retirement, shall have the right to elect within ninety (90) days after such termination of service, and without right or revocation, whether to allow his accumulated contributions to remain in the retirement fund. Upon the qualification for retirement by reason of age or disability of a member who has elected to allow his accumulated contributions to remain in the retirement fund, he shall receive a retirement allowance in accordance with the provisions of section 68-901, exclusive of subparagraph (g) of section 68-901.

- Any member may redeposit in the retirement fund, in one sum or in not to exceed twelve (12) monthly or twenty-four (24) semimonthly payments, an amount equal to that which he withdrew therefrom at the last termination of his membership, subject to minimum monthly or semimonthly payments as fixed by the board of administration. If a member, upon re-entering the retirement system after a termination of his membership, does not elect to make or, having so elected, subsequently does not make such redeposit, he shall re-enter as a new member without credit for any service except the prior service credited to him before said termination, and the rate of his contribution for future years shall be the normal rate provided for in this act at his age of re-entrance; otherwise his rate of contribution for future years shall be the same as his rate prior to the last termination of his membership, and his membership shall be the same as if unbroken by such last termination. Regardless of whether such redeposit is made, the documents held by the retirement system as executed by said member prior to termination of membership shall be held by the system for the same purposes as prior to said termination, and beneficiaries nominated in such documents shall continue unchanged until changed as provided herein.
- (o) The board may in its discretion transfer the savings account of a member to the pension accumulation fund if the account has been dormant for a period of ten (10) years provided that no right of the member shall be jeopardized by such transfer and the savings account shall be transferred to the member's name upon subsequent re-entry to membership.

History: En. Sec. 18, Ch. 212, L. 1945; amd. Sec. 6, Ch. 297, L. 1947; amd. Sec. 2, Ch. 176, L. 1953; amd. Sec. 5, Ch. 92, L. 1955; amd. Sec. 3, Ch. 246, L. 1959.

Compiler's Note

The bracketed word "or" in subd. (f) was inserted by the compiler.

References

State ex rel. Jardine v. Ford, 120 M 507, 188 P 2d 422, 424.

CHAPTER 8

RETIREMENT-COMPULSORY-VOLUNTARY

Section 68-801. Voluntary service retirement. 68-802. Compulsory retirement.

68-801. Voluntary service retirement. (a) Retirement of a member for service shall be made by the board of administration upon his attaining the age of sixty (60) years or more and upon his completion of ten (10) or more years of public service credited under this act and the filing of

his written application to the board, subject to the provisions of section 68-901; and provided, however, that the service retirement allowance shall commence on the day following the member's last day of state service or on the first day of the month in which his application is filed with the board of administration, whichever is later.

- (b) Notwithstanding any other provision of this act, any person who has been retired for service (as distinguished from disability) under the provisions of this act may be employed in state service in accordance with the laws governing such service in the same manner as a person who has not been so retired.
- (c) Any person so employed shall be considered as reinstated from retirement and his retirement allowance shall be canceled forthwith. His individual account shall be credited with an amount which is the actuarial equivalent of his annuity at the time of such reinstatement, and his rate of contribution for future years shall be the same as if he had continued in state service during the period of his retirement. Such person shall receive credit for prior service in the same manner as if he had never been retired.

History: En. Sec. 19, Ch. 212, L. 1945; amd. Sec. 7, Ch. 297, L. 1947; amd. Sec. 5, Ch. 186, L. 1951; amd. Sec. 1, Ch. 35, L. 1955; amd. Sec. 4, Ch. 246, L. 1959.

District Judge

Retirement of a district judge under this act creates a vacancy which must be filled by the governor. State ex rel. Jardine v. Ford, 120 M 507, 188 P 2d 422.

68-802. Compulsory retirement. Any member forced to retire at age sixty-five (65) or over, not having accumulated ten (10) or more years of public service credited under the Montana public employees' retirement system may, by filing his written application with the board, elect to receive a service retirement allowance subject to the provisions of section 68-901.

History: En. 68-802 by Sec. 1, Ch. 244, L. 1959.

CHAPTER 9

SERVICE AND DISABILITY RETIREMENT ALLOWANCES

Section 68-901. Service retirement allowance.

- 68-901. Service retirement allowance. A member upon retirement from service is entitled to receive a service retirement allowance which shall consist of:
- (a) An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of his retirement.
- (b) A pension, purchased by the contributions of the state, or the contracting city, equal to that portion of the annuity purchased by the accumulated normal contributions of the member; and
- (c) An additional pension, purchased by the contributions of the state, for members other than persons who are employees of the university at the time of becoming members, and members employed by a contracting city. Such additional pension shall be equal to one-seventieth (1/70)

of the member's final compensation, multiplied by the number of years of prior service, except that if a member retires before attaining the age of sixty-five (65) years, the additional pension shall be reduced to that amount which the value of the pension computed as provided in this paragraph as deferred to age sixty-five (65) will purchase at the actual age of retirement.

- (d) If a member retires before attaining the age of sixty-five (65) years, the additional pension shall be reduced to that amount which the value of the pension computed as provided in this section as deferred to age sixty-five (65) will purchase at the actual age of retirement.
- (e) An additional pension, purchased by contributions of the state, for members who are also employees of the university at the time of becoming members, said additional pension to accrue from the date of retirement under the system regardless of whether said retirement was prior to the effective date hereof. Such additional pension shall be equal to one-seventieth (1/70) of the average annual compensation earnable by him during the three (3) years preceding retirement, multiplied by the number of years of prior service credited to him, except that if a member retires before attaining the age of sixty-five (65) years, the additional pension shall be reduced to that amount which the value of the pension computed as provided in this paragraph as deferred to age sixty-five (65), will purchase at the actual age of retirement. If, however, a member who is employed by the university at the time of becoming a member, shall not have rendered state service before January 1, 1946, his additional pension shall be based upon one-seventieth (1/70) of the average annual compensation earnable by him during the first year of the state service, or such portion thereof as he may have served before January 1, 1946, multiplied by the number of years of prior service credited to him.
- (f) An additional pension on account of prior service, purchased by the contributions of the contracting city for members who are also employees of a contracting city as may be provided for under the contract between the board and the contracting city.

MINIMUM GUARANTEE

(g) When a member enters the retirement system with, or without, credit for prior service, and is otherwise eligible for retirement after attaining the age of seventy (70) years, if his final compensation was such that one-half $(\frac{1}{2})$ thereof is in excess of the total of his pension, annuity, and additional pension for prior service, a second additional pension for prior service sufficient to cause his retirement allowance to amount to one-half $(\frac{1}{2})$ of such final compensation shall be paid him on account of prior service, but in no event shall a greater second additional pension be paid than will cause the total retirement allowance, exclusive of the annuity provided by his accumulated additional contributions, to amount to the sum of four hundred eighty dollars (\$480.00) per year. The provisions of this section shall not apply to the members who are employees of a contracting city unless provided for by contract between the board and the contracting city, but if a member be employed by more than one

(1) of such cities, his aggregate retirement allowances shall be taken into account in applying said provisions, and said application shall be made as if the member was employed by one or more offices or departments of the state.

DISABILITY RETIREMENT

Any member who has not reached seventy (70) years of age shall be retired for disability if incapacitated for the performance of duty as the result of any injury or disease arising out of and in the course of his employment. Incapacity for performance of duty shall be determined by the board of administration of the public employees' retirement system, and said board of administration shall determine whether such incapacity is the result of injury or disease arising out of and in the course of employment. In the discharge of its duty regarding such determination, the board or any member thereof or duly authorized examiner or other duly authorized representative of the board shall have power to conduct hearings, administer oaths and affirmations, take depositions, certify to official acts and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda and other records deemed necessary as evidence in connection with a claim for disability retirement. If the board determines on the evidence that it obtains and application filed that the disability resulted from injury or disease arising out of and in the course of employment, the said member shall be retired forthwith and be paid the benefits provided under the retirement system. Any such member incapacitated for the performance of duty by reason of a cause not included in the immediately preceding sentence, and any other member so incapacitated, regardless of the cause, shall be retired forthwith regardless of age but only after ten (10) years of service to the state, or to the contracting city.

Any compensation paid by the industrial accident board of the state of Montana to any member of the retirement system for total and permanent disability resulting from injury or disease arising out of and in the course of employment shall be deducted from the benefits payable under the retirement system for such disability.

In any case where the industrial accident board makes a determination that disability of a state employee resulted from injury or disease arising out of and in the course of employment and pays compensation thereon for a total and permanent disability, the industrial accident board shall certify its findings and determination to the board of administration of the public employees' retirement system.

(i) Subject to the requirements as to service and cause of disability stated in subdivision (h) of this section, and upon the application of a member or upon the application of the head of the office or department in which such member is or was last employed, or upon application of the university, if such member is an employee of the university, or any other person on behalf of such member, while such member is in state service, within four (4) months after such member's discontinuance of state service, or while such member continuously, from the date of discontinuance of state service to the time of the application or motion,

is physically or mentally incapacitated to perform his duties, may apply for, or the board of administration upon its own motion may order, a medical examination to determine the existence of such incapacity. Upon the receipt of such application, the board of administration shall order such medical examination. If the medical examination and other available information show, to the satisfaction of said board, that the member is incapacitated physically or mentally for the performance of his duties in the state service, the said board shall forthwith retire the member for disability. The said board shall secure such medical service and advice as is necessary to carry out the purposes of this section and of sections 68-1001 through 68-1004, and shall pay for such medical services and advice such compensation as the board deems reasonable.

DISABILITY RETIREMENT ALLOWANCE

- (j) Upon retirement for disability a member who has attained the age of sixty (60) years shall receive a service retirement allowance as provided by subsections (a), (b), (c) of this section. Upon retirement of a member for disability resulting from injury or disease arising out of and in the course of employment, such member shall receive a retirement allowance of fifty per centum (50%) of his final compensation.
- (k) Upon retirement for disability a member who is an employee of the university and who has attained the age of sixty (60) years, shall receive a service retirement allowance as provided in subdivisions (a), (b), and (c) of this section.
- (1) Every other member retired for disability shall receive a retirement allowance which shall consist of:
- (i) An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of his retirement; and
- (ii) If, in the opinion of the board of administration, such disability is not due to intemperance, willful misconduct or violation of law on the part of the member, a pension purchased by the contributions of the state, or of the contracting city which, together with his annuity provided by his accumulated normal contributions, shall make the retirement allowance, exclusive of the annuity provided by his accumulated additional contributions, equal to (a) ninety per cent (90%) of one-seventieth (1/70) of his final compensation multiplied by the number of years of service credited to him, if such disability retirement allowance exceeds one-fourth $(\frac{1}{4})$ of his final compensation; otherwise, (b) ninety per cent (90%) of oneseventieth (1/70) of his final compensation multiplied by the number of years of service which would be creditable to him were his service to continue until attainment by him of age sixty-five (65), but in such case the retirement allowance shall not exceed one-fourth (1/4) of such final compensation. In no event, however, shall the pension purchased by the contributions of the state or of the contracting city be more than sufficient to make the disability retirement allowance, exclusive of the annuity provided by accumulated additional contributions, exceed the service retirement allowances, exclusive of any annuity purchased by accumulated additional contributions, receivable by the member should he retire at the lowest age at which he would be eligible for service retirement.

(iii) If, in the opinion of the board, the disability is due to intemperance, willful misconduct or violation of law, on the part of the member, and the annuity to which said member is entitled under subdivisions (j), (k) and (l) of this section, is less than two hundred forty (\$240.00) dollars per year, the board of administration in its discretion, may pay to said member, in one lump sum and in lieu of said annuity, his accumulated contributions

History: En. Sec. 20, Ch. 212, L. 1945; amd. Sec. 6, Ch. 186, L. 1951; amd. Sec. 5, Ch. 246, L. 1959.

Constitutionality

The requirement in subd. (h) for the deduction of workmen's compensation benefits in determining the retirement pay of a public employee, only in the event that the compensation benefits are received for total disability is unconstitutionally discriminatory in violation of Article 5, section 26 of the constitution of the state. State ex rel. Morgan v. White, 136 M 470, 348 P 2d 991.

Deduction of Workmen's Compensation Payments

Where person was entitled to benefits under both the disability retirement act and the Workmen's Compensation Act, and the award of the industrial accident board was for permanent partial disability, the retirement board was without authority to deduct such amount from the retirement allowance since it is only authorized where the award of the industrial accident board is for total and permanent disability. State ex rel. Ebel v. Schye, 130 M 537, 305 P 2d 350, 354.

Duty of Board in Determining Incapacity

Where the industrial accident board made a finding as to incapacity, but did not provide a hearing as required by the statute and by due process, the board had not yet performed its statutory duty and the relator in a mandamus proceeding was entitled to an order commanding the board to grant a hearing. State ex rel. Morgan v. White, 136 M 470, 348 P 2d 991.

CHAPTER 10

REINSTATEMENT—REDUCTION OF ALLOWANCE—OPTIONAL MODIFICATION OF ALLOWANCES

Section 68-1001. Reinstatement from disability retirement.

68-1002. Reduction of allowance when employed.

68-1003. Effect of refusal of beneficiary to submit to medical examination.

68-1004. Payment in case of cancellation of disability allowance.

68-1005. Optional modification of retirement allowance.

68-1001. Reinstatement from disability retirement. (a) The board of administration, may, at its pleasure, require any disability beneficiary to undergo medical examination. Such examination shall be made by a physician or surgeon, appointed by the board, at the place of residence of said beneficiary or other place mutually agreed upon. Upon the basis of such examination the board shall determine whether said disability beneficiary is still incapacitated, physically or mentally, for service in the office or department of the state or of the contracting city, where he was employed and in the position held by him when retired for disability, or for duties proposed to be assigned to him. If the board of administration determines that said beneficiary is not so incapacitated, his retirement allowance shall be canceled forthwith. If he was an employee of the state or of the university, he shall be reinstated to the position held by him when retired for disability or to a position in the same classification with duties within his capacity. If he was an employee of a contracting city, the board shall notify the proper official of said city that said disability has been terminated and that said person is eligible for reinstatement to duty. The fact that said person was retired for disability shall not prejudice any right to reinstatement to duty which he may have or claim to have.

- (b) In the case of such a member who is an employee of a contracting city, and who for any reason is not so reinstated or is not re-employed by said city in a position subject to the retirement system, he shall be paid an amount which is the actuarial equivalent of his annuity at that time, as based on a disabled life, but said amount shall not exceed the amount of his accumulated contributions as such amount stood at the time of his retirement for disability.
- (c) Should a disability beneficiary re-enter the state service and be eligible for membership in the retirement system in accordance with section 68-202, his retirement allowance shall be canceled and he shall immediately become a member of the retirement system, his rate of contribution for future years being that established for his age at the time of such re-entry. His individual account shall be credited with an amount which is the actuarial equivalent of his annuity at that time, as based on a disabled life, but such amount shall not exceed the amount of his accumulated contributions as such amount stood at the time of his retirement for disability. Such member shall receive credit for prior service in the same manner as though he had never been retired for disability.

History: En. Sec. 21, Ch. 212, L. 1945; amd. Sec. 6, Ch. 92, L. 1955.

Finding that Person No Longer Incapacitated

Where there was substantial evidence to support the trial court's implied finding that the retirement board acted capriciously and arbitrarily in finding that a

person was no longer incapacitated that finding will be upheld on appeal; however, this affirmance does not have the effect of ousting the board from jurisdiction to so find in the future. State ex rel. Ebel v. Schye, 130 M 537, 305 P 2d 350, 358. Special concurring opinion in denying petition for rehearing.

68-1002. Reduction of allowance when employed. Should a disability beneficiary engage in a gainful occupation not in the state service or should he re-enter the state service in a capacity ineligible for membership in the retirement system, the board of administration shall reduce the amount of his monthly pension to an amount which, when added to the compensation earned monthly by him in such occupation, shall not exceed the amount of his monthly compensation at the time of his retirement. Should the earning capacity of such beneficiary be further altered, the board may further alter his pension to an amount which shall not exceed the amount upon which he was originally retired, but which, subject to such limitation, shall equal, when added to the compensation earned by him, the amount of his compensation at the time of his retirement.

History: En. Sec. 22, Ch. 212, L. 1945; amd. Sec. 7, Ch. 92, L. 1955.

68-1003. Effect of refusal of beneficiary to submit to medical examination. Should any disability beneficiary refuse to submit to medical examination, his pension may be discontinued until his withdrawal of such refusal, and should such refusal continue for one (1) year his retirement allowance may be canceled.

History: En. Sec. 23, Ch. 212, L. 1945; amd. Sec. 8, Ch. 92, L. 1955,

68-1004. Payment in case of cancellation of disability allowance. Should the retirement allowance of any disability beneficiary be canceled for any cause other than re-entrance into the state service, he shall be paid an amount which is the actuarial equivalent of his annuity at that time, based on a disabled life, but said amount shall not exceed the amount of his accumulated contributions as such amount stood at the time of his retirement for disability.

History: En. Sec. 24, Ch. 212, L. 1945.

- 68-1005. Optional modification of retirement allowance. Until the first payment on account of any retirement allowance is made, and subject to the conditions that, if he die after retirement and within thirty (30) days from the date upon which his election or changed election is received at the office of the retirement system in Helena, then said election is void and of no effect, and the death shall be considered as that of a member before retirement. A member or a beneficiary may elect, or revoke or change a previous election prior to the approval of the previous election, to receive the actuarial equivalent of his retirement allowance as of the date of retirement, in a lesser retirement allowance, payable throughout life with one of the following options:
- (a) Option 1. If he dies before he receives in annuity payments provided for in section 68-901, the amount of his accumulated contributions as it stood at his retirement, the balance of such accumulated contributions shall be paid to his estate or to such person, having an insurable interest in his life, as he shall nominate by written designation duly executed and filed with the board of administration.
- (b) Option 2. Upon his death, his lesser retirement allowance shall be continued throughout the life of and paid to such person, having an insurable interest in his life, as he nominates by written designation duly executed and filed with the board of administration at the time of his retirement.
- (c) Option 3. Upon his death, one-half of his lesser retirement allowance shall be continued throughout the life of and paid to such person, having an insurable interest in his life, as he nominates by written designation duly executed and filed with the board of administration at the time of his retirement.
- (d) Option 4. Such other benefit or benefits shall be paid, either to the beneficiary or to such other person or persons as he nominates, as, together with such lesser retirement allowance, are the actuarial equivalent of his retirement allowance, and shall be approved by the board of administration.

History: En. Sec. 25, Ch. 212, L. 1945.

CHAPTER 11

DEATH BENEFITS

Section 68-1101. Death benefit.

68-1101. Death benefit. Upon the death before retirement of a member while in the state service, or within four (4) months after the dis-

continuance of state service, or while physically or mentally incapacitated for the performance of his duty, if such incapacity has been continuous from the discontinuance of state service, the retirement system shall be liable for a death benefit, which if there is a surviving wife or surviving children under eighteen (18) years of age, shall be paid in monthly installments and to the surviving wife and children as presented therein; otherwise such death benefit shall be paid to his estate, or to such person having an insurable interest in his life as he has nominated by written designation duly executed and filed with the retirement board; provided, however, that death benefits shall not be payable to the beneficiary of a member who (a) has elected a joint life annuity option as provided in section 68-1005, or (b) who has received a disability retirement allowance as provided for in paragraphs (i) through (l) of section 68-901, for a period of four (4) months immediately preceding death. Such death benefit shall consist of:

- (a) His accumulated contributions, and in addition thereto,
- (b) An amount, provided from contributions by the state, or by a contracting city, which shall be equal to one-twelfth (1/12th) of the annual compensation earnable by the deceased during the twelve (12) months immediately preceding his death, multiplied by the number of completed years of service under the system, but not to exceed fifty (50) per centum of such compensation.
- (c) A member, or a beneficiary after death of a member, may elect, by written designation, duly executed and filed with the board of administration to have the death benefit provided in clauses (a) and (b) paid in monthly installments, fixed in number or amount, all subject to such rules and regulations as the board may adopt. Regular interest shall be credited on the unpaid balance of such benefit, at rates then in use under the system as adopted by the board from time to time.
- (d) If compensation is awarded by the industrial accident board of the state of Montana by reason of a finding that the member's death resulted from injury or disease arising out of or in the course of employment, the death benefit payable hereunder shall be limited to a refund of the member's accumulated contributions. In any case where the industrial accident board makes a determination that death of a state employee resulted from injury or disease arising out of and in the course of employment and pays compensation therefor, the industrial accident board shall certify its findings and determination to the board of administration of the public employees' retirement system.
- (e) Survivorship provision. In lieu of the benefits provided in (a) and (b) above, if the deceased member is qualified by reason of service for a retirement benefit, the beneficiary nominated by the deceased member may elect to receive a monthly life annuity. Said monthly life annuity is to be based on the beneficiary's attained age at the time of the deceased member's death and to be calculated from an amount equal to the required reserve for the deceased member's creditable service, together with the deceased member's accumulated contributions; and provided that this provision be retroactive for all members who had an option for a lesser retire-

ment allowance filed in the retirement system office at the time of their death.

(f) The beneficiary named in (e) above shall have the right within ninety (90) days of the member's death to elect to receive a death benefit instead of the benefit designated in (e) above.

History: En. Sec. 26, Ch. 212, L. 1945; 2, Ch. 225, L. 1953; amd. Sec. 9, Ch. 92, amd. Sec. 7, Ch. 186, L. 1951; amd. Sec. L. 1955.

CHAPTER 12

BENEFITS TO WHOM PAID

Section 68-1201. Nomination of beneficiary—payment to next of kin without probate—affidavit required—case of minor—funeral expenses—payment of amount due on effective date.

68-1201. Nomination of beneficiary—payment to next of kin without probate—affidavit required—case of minor—funeral expenses—payment of amount due on effective date. (a) The nomination by a member of a beneficiary under the retirement system may be revoked at the pleasure of the member or beneficiary making the nomination and a different beneficiary nominated by a written instrument duly executed and filed with the board. If no beneficiary shall be nominated or if the estate shall be the beneficiary, and if said estate would not be probated, if no amount were due from the retirement system, all of the said amount due, including retirement allowances accrued but not received prior to death, shall be paid directly without probate to the surviving next of kin of the deceased, or the guardians of said survivor's estate, share and share alike, payment to be made in the same order in which the following groups are listed:

- 1. Husband or wife, or
- 2. Children, or
- 3. Father and mother, or
- 4. Grandchildren, or
- 5. Brothers and sisters, or
- 6. Nieces and nephews.
- (b) No payment shall be made to persons included in any of said groups if at the date of payment there be living persons in any of the groups preceding it, as listed, and payment to the persons in any group, upon receipt from said persons of an affidavit upon a form supplied by the retirement board, that there are no living individuals in the groups preceding it and that the estate of the deceased will not be probated, shall be in full and complete discharge and acquittance of the board and system on account of said death. If any person entitled to a benefit from the system shall be a minor who has no guardian of his estate, said benefit not to exceed five hundred dollars (\$500.00) may be paid to the person entitled to the custody of a minor to hold for the minor, upon the written statement, duly acknowledged and verified, of such person that the total estate of the minor does not exceed one thousand dollars (\$1,000.00) in value, and such payment shall be full and complete discharge and acquittance of the board and system. Such persons shall account to the minor for the money when the minor reaches the age of majority.

- (c) The retirement board, in the event that the whereabouts of the nominated beneficiary cannot be determined, or in the event that the beneficiary be the estate of the deceased person, or if no beneficiary be nominated, may pay to the undertaker who conducted the funeral, or to any person or organization who has paid said undertaker from said person's or organization's own funds, in its discretion all or a portion of any amount payable under the retirement system, but not to exceed the funeral expenses of such deceased person or the portion of such expenses paid by said person or organization as evidenced by the sworn itemized statement of the undertaker and by such other documents as the board may require. Said payment shall be full and complete discharge and acquittance of the board and system up to the amount so paid, anything in this act to the contrary notwithstanding.
- (d) Any amount due from the retirement system on the effective date hereof, because of death, may be paid in accordance with the provisions of this section, but only persons living on said effective date shall receive any part of said amount due.

History: En. Sec. 27, Ch. 212, L. 1945.

CHAPTER 13

MISCELLANEOUS PROVISIONS

Section 68-1301. Retirement benefits not modified by compensation insurance—subrogation provided for.

68-1302. Monthly payment of allowance.

68-1303. Retirement fund exempt from execution, garnishment, attachment or assignment.

Right to retirement allowance guaranteed. 68-1304.

68-1305. Estimate of age and service.

- 68-1306. Retired members not eligible for retirement allowance while in state service.
- 68-1307. Allocation of money to public employees' retirement fund-disbursement procedure-contributions under this section, how applied.

68-1308. Maximum salary considered.

- 68-1309. Transfer from one fund to another.
- 68-1310. Appropriation for administrative expense.

68-1311. Budget act not applicable.

68-1312. Act, how cited.

68-1313. Adjustments authorized.

68-1314. State departments to pay to public employees' retirement fund.

68-1315. Budget act not applicable.

68-1316. State employees paid from federal funds-national guardsmen,

68-1317. Reciprocity of credits.

68-1318. Eligibility for benefits. 68-1319. Transfer of credits.

68-1320. Determination of refund and benefits by last system to which employee contributed.

68-1301. Retirement benefits not modified by compensation insurance subrogation provided for. (a) If an injury, known to result in the retirement of and/or the death of a member of the retirement system is the proximate consequence of the act of a person other than his employer, the board shall have the right to recover from said person, on behalf of the retirement system, an amount which shall be the actuarial equivalent of the benefits which are provided by contributions of the state and for which

the retirement system shall be liable because of said injury and/or death. The board of administration may do any and all things necessary to recover on behalf of the retirement system any and all amounts which the board might recover from employees, or from third persons under any provisions of this act, any other provisions of law of the state of Montana, including any provision by which an insurer might recover by subrogation, or otherwise, including the right to commence and prosecute actions, to file liens, to intervene in court proceedings, or to compromise claims before or after commencement of suit, except that any claim in favor of the retirement system against such third person, may be compromised only in such amount as may be approved by a person duly authorized by the board for such purpose. The agreed cost of such service and the expense incidental thereto is a proper charge against the fund out of which the compensation of an injured state employee is paid; and such cost and expense shall be reimbursed to the retirement system by the contracting city by which an injured member is employed.

- (b) Any amount recovered by way of subrogation by the employer, workmen's compensation insurer or retirement system shall be applied first to the amounts which the employer or its insurer shall have paid or become obligated to pay, and second, on the amounts which the retirement system shall have paid or become obligated to pay.
- (c) Amounts by which retirement and death allowances are reduced under the provisions of section 68-1201 and net amounts recovered from third persons under the provisions of this section, shall be paid by the retirement system to the fund out of which the compensation of the injured member is paid, or to the contracting city which pays the compensation of the injured member as the case may be.

History: En. Sec. 28, Ch. 212, L. 1945.

68-1302. Monthly payment of allowance. A pension, an annuity or retirement allowance granted under the provisions of this act shall be payable in equal monthly installments but a smaller pro rata amount may be paid for part of a month when the pension, annuity or retirement allowance begins after the first day of the month or ends before the last day of the month.

History: En. Sec. 29, Ch. 212, L. 1945.

68-1303. Retirement fund exempt from execution, garnishment, attachment or assignment. The right of a person to a pension, an annuity or a retirement allowance to the return of contributions, the pension, annuity or retirement allowance itself, any optional benefit, any other right accrued or accruing to any person under the provisions of this act and the moneys in the fund created under this act shall not be subject to execution, garnishment, attachment, state or municipal taxes, or any other process whatsoever, and shall be unassignable except as in this act specifically provided.

History: En. Sec. 30, Ch. 212, L. 1945; amd. Sec. 10, Ch. 92, L. 1955.

68-1304. Right to retirement allowance guaranteed. After a member has qualified as to service and disability for retirement for disability, or

as to age and service, for retirement for service, nothing shall deprive him of the right to a retirement allowance as determined under this act. Such retirement allowance and qualification therefor, shall be subject otherwise to the provision of this act.

History: En. Sec. 31, Ch. 212, L. 1945.

References

State ex rel. Jardine v. Ford, 120 M 507, 188 P 2d 422, 423.

68-1305. Estimate of age and service. If it shall be impracticable for the board of administration to determine from the records the length of service, the compensation or the age of any members, or if any member refuses or fails to give the board a statement of his state service, his compensation or his age, the said board may estimate, for the purposes of this act, such length of service, compensation or age.

History: En. Sec. 32, Ch. 212, L. 1945.

68-1306. Retired members not eligible for retirement allowance while in state service. No person who has been retired for service or disability shall be paid any retirement allowance during the time which he receives compensation for service rendered by him to the state or to a contracting city after the date of his retirement.

History: En. Sec. 33, Ch. 212, L. 1945; amd. Sec. 11, Ch. 92, L. 1955.

References

State ex rel. Jardine v. Ford, 120 M 507, 188 P 2d 422, 423.

- 68-1307. Allocation of money to public employees' retirement fund—disbursement procedure—contributions under this section, how applied.

 (a) From and after July 1, 1947, and during the biennium for which appropriations of money are made by this legislative assembly, there shall be paid monthly by each department, board, commission, bureau, or other agency of the state into the public employees' retirement fund out of moneys appropriated from the state general fund, a sum equal to three per cent (3%) of the total compensation paid members of the retirement system. In computing the amount of compensation upon which said three per cent (3%) shall be reckoned, there shall be included a sum equal to the amount of compensation which would have been paid to members of the system who elect to continue and do continue their contributions to the system and who are absent with the armed forces of the United States, so long as such absence shall be continued.
- (b) Each department, board, commission, bureau or other agency of the state shall certify to the state auditor at the end of each month the total amount of compensation paid members of the retirement system, including that which would have been paid to members who are absent in the armed forces of the United States. The state auditor shall thereupon draw a warrant upon the state treasurer for said three per cent (3%) of compensation contributed by the state. Said warrant shall be drawn on funds appropriated to each department, board, commission, bureau or other agency of the state to the credit of the public employees' retirement fund and the state treasurer shall deposit the amount thereof in said retirement fund.

- (c) Contributions made to the retirement system under this section shall be applied by the board of administration to meet the state's obligations under the system in such order and amount as said board shall determine; provided, however, that said contributions shall be first applied to the liability accruing because of state service rendered during such year and on account of pensions provided for in section 68-901, such amounts to be determined by actuarial valuation as computed by the actuary of the said board.
- (d) Each department, board, commission, bureau or other agency of the state under whose supervision there are state employees who are paid either fully or in part from federal funds, but who are not subject to the federal retirement system, shall certify to the state auditor at the end of each month the total amount of compensation paid such employees who are members of the retirement system; and the state auditor shall thereupon draw a warrant upon the state treasurer in the amount of three per cent (3%) of the compensation of such employees, regardless of whether such compensation is partly or entirely derived from federal funds. Such warrant shall be drawn on funds appropriated to such department, board, commission, bureau or other agency of the state to the credit of the public employees' retirement fund and the treasurer shall deposit the amount thereof in said retirement fund.

History: En. Sec. 35, Ch. 212, L. 1945; amd. Sec. 8, Ch. 297, L. 1947.

68-1308. Maximum salary considered. From and after July 1, 1955, for the purpose of computing the total amounts of compensation of members under the provisions of section 68-1307, all compensation shall be used.

History: En. Sec. 36, Ch. 212, L. 1945; amd. Sec. 12, Ch. 92, L. 1955.

68-1309. Transfer from one fund to another. Any fund out of which payments are made under the provisions of this act may be reimbursed to the extent of such payments by transfer of a sufficient sum for such reimbursement from another fund or funds under the control of the same disbursing officer. The disbursing officer shall certify to the state auditor amount or amounts to be thus transferred, the fund or funds from and to which the transfer is to be made, and the auditor shall thereupon make the transfer as directed in the certificate.

History: En. Sec. 37, Ch. 212, L. 1945.

68-1310. Appropriation for administrative expense. Out of any money in the state treasury not otherwise appropriated there is hereby appropriated the sum of \$35,000.00 for the purpose of defraying the administrative expense of the act, including the salary of the secretary and other employees and the necessary expenses of the board of administration. The above appropriation is for the coming biennium only. Thereafter, it shall be the duty of each and every state board, commission, department and institution whose employees are subject to the retirement system created by this act to include in their budget and request for legislative appropriations, an amount necessary to defray the state's part of the costs of this act for em-

ployees in their respective departments, and to the end that the legislature may make definite appropriation for the cost incurred by each board, department or institution whose employees are within the retirement system created by this act.

History: En. Sec. 38, Ch. 212, L. 1945.

68-1311. Budget act not applicable. This act shall be valid and effective despite any provisions in the State Budget Act to the contrary.

History: En. Sec. 39, Ch. 212, L. 1945.

68-1312. Act, how cited. This act may be cited as the Public Employ-ees' Retirement Act.

History: En. Sec. 40, Ch. 212, L. 1945.

68-1313. Adjustments authorized. If more or less than the correct amount of contribution required by this act of members, the state, or contracting city, is or has been paid, proper adjustment shall be made in connection with the subsequent payments, or such adjustments may be made by direct cash payments between the member, state or contracting city, in connection with whom the error was made, and the board of administration; adjustments to correct any other errors in payments to or by the board of administration may be made in the same manner.

History: En. Sec. 41, Ch. 212, L. 1945.

68-1314. State departments to pay to public employees' retirement fund. All departments, boards, bureaus, commissions, and other agencies of the state shall pay to the public employees' retirement fund out of moneys heretofore appropriated to them and unexpended during the biennium July 1, 1945, to July 1, 1947, or hereafter appropriated to them a sum equal to the percentage of total compensation paid members of the retirement system and designated in the provisions of sections 68-101 to 68-1313.

History: En. Sec. 1, Ch. 40, L. 1947.

68-1315. Budget act not applicable. This act shall be valid and effective despite any provisions in the State Budget Act to the contrary.

History: En. Sec. 2, Ch. 40, L. 1947.

- 68-1316. State employees paid from federal funds—national guardsmen. (a) A state employee whose compensation is paid either fully or in part from federal funds, but who is not subject to the federal retirement system, shall be entitled to all benefits and be required to make all employee contributions under the public employees' retirement system of the state of Montana, based upon the full salary received by such employee, including that portion of salary paid from federal funds.
- (b) From and after July 1, 1961, all employees of the Montana army and air national guard shall become members on the first day of employment, except those employees who are in state service on July 1, 1961, or prior thereto, who have filed with the board of administration an election not to become members, provided any person so excluded from member-

ship by his own election may at any time, while he is an employee, file with the board of administration an election to become a member and receive credit for prior service under the provisions of section 68-501(h).

History: En. Sec. 9, Ch. 297, L. 1947; amd. Sec. 1, Ch. 181, L. 1961.

68-1317. Reciprocity of credits. Any person who has acquired, or shall acquire, credits or equities toward a retirement allowance, death benefit. or refund of contributions under the public employees' retirement system of Montana, or under the teachers' retirement system of the state of Montana, who terminates his employment in a department, agency, or division of the state of Montana, or in a school, college, or university in the state of Montana, covered by any of said systems and shall become employed in a department, agency, division, school, college or university covered by another of said systems, shall be entitled to have applied in such other system all his said credits or equities in accordance with and to the extent set forth in this act, provided that the same shall not have been forfeited by withdrawal unless the forfeited credits shall have been reinstated as by law provided. Any person who is concurrently employed by employers under both of said systems shall be entitled to establish credits or equities in each of said systems in accordance with and to the extent set forth in this act.

History: En. Sec. 1, Ch. 132, L. 1953.

68-1318. Eligibility for benefits. Eligibility of any such person for a retirement allowance, or for a death benefit or for a disability benefit, or for a refund of contributions shall be governed by the provisions of the act creating the system to which the person last made contributions, provided however that said system, in determining such eligibility, shall take into account the entire length of service rendered by such person for which he shall have been granted credit under both of said systems.

History: En. Sec. 2, Ch. 132, L. 1953.

68-1319. Transfer of credits. Upon transfer of an employee from one system to another, his accumulated contributions or accumulated normal contributions, and his service credits, both prior and membership, as certified by either system shall be transferred to the system to which the employee transfers.

History: En. Sec. 3, Ch. 132, L. 1953.

68-1320. Determination of refund and benefits by last system to which employee contributed. The amount of any refund, retirement allowance, death benefits, or disability allowance to which any such employee shall be entitled, shall be determined according to the rules of the system to which he last contributed.

History: En. Sec. 4, Ch. 132, L. 1953.

TITLE 69

PUBLIC HEALTH AND SAFETY

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 - Industrial hygiene, 69-201 to 69-208.
 - Tuberculosis control, 69-301 to 69-319. Dental health, 69-401 to 69-404. 3.
 - 4.
 - Vital statistics, 69-501 to 69-539. 5.
 - Local boards of health in cities and towns—creation—powers and duties, 69-601 to 69-609.
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CHAPTER 1

STATE BOARD OF HEALTH—CREATION—POWERS AND DUTIES

- Section 69-101. Creation of the state board of health of the state of Montana.
 - 69-102. State board of health-members-appointment, qualifications-termsvacancy—officers—meetings—compensation.
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69-105. Functions, powers and duties of board.

69-105.1. Additional powers of board.

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69-121. Quarantine measures.

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69-125. Sewer system to be approved by board of health-appeal to district

69-126. Adulterated and misbranded foods, drugs, etc., publication of list. 69-127. Persons subject to epileptic type seizures—report of physicians required—recommendations as to licensing persons to drive.

69-101. (2444) Creation of the state board of health of the state of There is hereby created, as an agency of the executive branch of the state government of the state of Montana "the state board of health of the state of Montana" and such board is invested with the powers, and charged with the performance of the duties, in this act set forth, and, in addition, with such other and further powers and duties as are otherwise prescribed by existing law, and as are hereafter prescribed by law.

History: Ap. p. Sec. 1, Ch. 110, L. 1907; Sec. 1474, Rev. C. 1907; en. Sec. 1, Ch. 157, L. 1919; re-en. Sec. 2444, R. C. M. 1921; amd. Sec. 1, Ch. 225, L. 1943; amd. Sec. 1, Ch. 57, L. 1949. Cal. Pol. C. Sec. 2978.

Cross-References

Administration of Food and Drug Act, sec. 27-112.

Dental health, sec. 69-401.

Industrial hygiene, sec. 69-201. Tuberculosis control, sec. 69-301. Vital statistics, sec. 69-501.

References

City of Miles City v. State Board of Health, 39 M 405, 413, 102 P 696; Bacus

v. Lake County, - M -, 354 P 2d 1056,

Collateral References

Health == 2 et seq. 39 C.J.S. Health § 6 et seq. 25 Am. Jur. 291, Health, §§ 9 et seq.

Personal liability of health officer. 24 ALR 798.

Law Review

Clark, "Ground Water Legislation in the Light of Experience in the Western States," 22 Mont. L. Rev. 42, 57 (Fall 1960).

69-102. (2445) State board of health—members—appointment, qualifications—terms—vacancy—officers—meetings—compensation. There is hereby created "the state board of health of the state of Montana," hereinafter referred to as the "board," which shall consist of seven (7) members, to be appointed by the governor, three (3) of whom shall have the degree of doctor of medicine, one (1) of whom shall have the degree of doctor of dental surgery, and three (3) of whom shall be lay persons, each of whom has demonstrated intelligent and active interest in the field of public health in Montana. For the purpose of this act a "lay person" is hereby defined as any person who does not hold the degree of doctor of dental surgery or doctor of medicine. The governor shall make such appointments not later than thirty (30) days prior to June 30, 1949. The members appointed shall be so named and appointed that the term of office of one (1) of such members shall expire on the thirtieth (30th) day of June, 1950, and the term of one (1) member shall expire on the thirtieth (30th) day of each succeeding June thirtieth (30th) in each of the years 1951 through 1956, inclusive. Upon the completion of each original term successively, each subsequent appointment shall be promptly made by the governor for a full term of seven (7) years, each regular term to run from June thirtieth (30th), and each appointment shall be subject to confirmation by the senate of the state of Montana. Appointments shall be made to the board in such manner that the representation from the doctors of medicine, the doctors of dental surgery and the lay persons shall at all times be continued and preserved as herein set forth. Each vacancy on the board shall be filled by the governor by the appointment of a qualified person to serve for the unexpired term, subject to confirmation by the senate. In the event any member of the board fails to attend three (3) meetings of the board in any calendar year, the seat of such member shall forthwith become automatically vacant, provided that the member has not been excused for illness, or for other good cause found sufficient by the board.

The board first appointed under the provisions of this act shall meet at twelve o'clock (12:00) noon on July 1, 1949, and shall elect from its members a president, a vice-president, a secretary, and such other officers as it shall determine. The board may require its executive officer, hereinafter provided for, to serve as secretary of the board.

The secretary of the board, whether a member of the board, or its executive officer, shall keep complete and accurate minutes of each meeting of the board, and of every motion, resolution, act and all proceedings of the board.

Regular meetings of the board shall be held not less than once every two (2) months at such time or times as may be fixed by resolution of the board to effect such meetings in compliance with this act. Special meetings may be called by the president, by the executive officer, or by a majority of the members of the board at any time on three (3) days' prior notice by mail, or in case of epidemics, water pollution dangerous to health, floods or other emergencies on twenty-four (24) hours' notice by telephone or telegraph. The board shall adopt, and at any time may amend bylaws in relation to its meetings and the transaction of its business. A majority shall constitute a quorum of the board. Each member of the board shall receive the sum of ten dollars (\$10.00) per day for each day's attendance at meetings of the board, and when in the field acting for the board, and shall be

reimbursed for his traveling and subsistence expenses when absent from his place of residence in attendance at meetings or when in the field acting for the board. In every suit or proceeding in which the acts of the board are the subject of inquiry, the meetings of the board shall be deemed to have been duly called and regularly held, and all orders and proceedings of the board shall be deemed to have been regularly authorized, unless the contrary be proved.

History: En. Sec. 2, Ch. 157, L. 1919; re-en. Sec. 2445, R. C. M. 1921; amd. Sec. 2, Ch. 225, L. 1943; amd. Sec. 2, Ch. 57, L. 1949; amd. Sec. 1, Ch. 181, L. 1953.

Collateral References Health© 2 et seq. 39 C.J.S. Health § 7 et seq.

(2446) Executive officer—appointment—qualifications—compen-The administrative and executive head for the board shall be its executive officer, and the office of executive officer of the state board of health of the state of Montana is hereby created. The executive officer shall be appointed by the board, and shall have the following qualifications: he shall have a degree of doctor of medicine; he shall have successfully completed at least one (1) year of graduate study in an approved school of public health, and he shall have had at least two (2) years experience in administrative practice as a full-time public health officer; he shall be eligible for license by the board of medical examiners of the state of Montana, and he must obtain a license from such board not later than six (6) months after his appointment in one or the other of the methods prescribed by the laws of this state. Provided, that if no such qualified person is available for appointment as executive officer, the board in its discretion may appoint, for a period of not over one (1) year, a doctor of medicine regularly licensed in Montana, who has had at least five (5) years of active practice in that profession and who shall not be eligible for reappointment. The executive officer shall receive such annual salary as may be fixed by the legislative assembly; shall be allowed traveling and subsistence expenses incurred in the performance of his official duties when absent from his place of residence; shall be custodian of all property of the board, and when acting as secretary of the board, custodian of its records, files and minute book, and shall perform all the duties of the secretary of the board as prescribed by law, when acting as secretary by appointment and order of the board; he shall devote his entire time to his official duties and shall not engage in the private practice of medicine or in any other occupation; the executive officer shall be subordinate to the board in the performance of his duties under this act

(b) The board is authorized, with the approval of the state board of examiners, to enter into a formal, written contract to secure the services of its executive officer for a definite term of years, not exceeding ten (10) in number, and the reciprocal obligations of the board and such person, including the compensation fixed by the legislative assembly shall be defined and stated in such written contract; or the board may appoint its executive officer for a definite term of not to exceed ten (10) years. In either event, the executive officer may be removed during his term only after hearing by the board on at least twenty (20) days' notice, after veri-

fied charges preferred against him have been sustained by preponderance of the evidence.

- (c) Each division and section of the board shall be under the management of a head, responsible to the executive officer, and such heads and all other subordinate personnel of the division shall be appointed by the executive officer by and with the consent of the board, under the provisions and principle of a merit system of personnel administration. The rules, regulations and compensation schedules for which the board is hereby authorized and directed to adopt, shall in all respects be in conformity to the merit system established by law for personnel of the government of the state of Montana.
- (d) Before presenting a request for appropriation from the legislative assembly the board shall confer with the head of each section or division.

History: En. Sec. 3, Ch. 157, L. 1919; re-en. Sec. 2446, R. C. M. 1921; amd. Sec. 3, Ch. 57, L. 1949; amd. Sec. 1, Ch. 212, L. 1961. Cal. Pol. C. Sec. 2982.

Collateral References
Health 7(1, 2).
39 C.J.S. Health § 7, 8, 49.

69-104. (2447) Repealed—Chapter 57, Laws of 1949.

Repeal

This section (Sec. 6, Ch. 110, L. 1907), relating to the duties of the secretary of

the state board of health, was repealed, as Sec. 2447, Revised Codes 1935, by Sec. 7, Ch. 57, Laws 1949.

69-105. (2448) Functions, powers and duties of board. The state board of health of the state of Montana (which may, for brevity, be referred to as the state board of health) shall have general supervision of the interests of health and life of the citizens of the state. The board shall continuously study the vital statistics of the state, and endeavor to make intelligent use of the records of births, deaths and sickness among the people; it shall make sanitary investigations and inquiries regarding the causes of disease. and especially communicable diseases and epidemics; the causes of mortality, and the effects of localities, employments, conditions, ingesta, habits, and other factors and circumstances affecting the health of the people; it shall gather such information in respect to all these matters as it may deem proper for diffusion among and use by the people; it shall cause to be made an inspection at least once in each year, and at such other times as it may be directed to do so by the governor, of all public institutions of the state of Montana, and make a report as to their sanitary conditions and environment, with suggestions and recommendations to the governor and to their respective boards of directors or trustees, visitors, officers and administrators for amelioration or abatement of conditions and factors adverse to health, and for correction, betterment and improvement in circumstances or practices affecting health, at such institutions; and it shall be the duty of the executive officers and administrators, and other persons in the immediate charge of such institutions to furnish all the facilities necessary for a thorough investigation and inspection at such institutions; the board shall, when requested, or when it shall deem best, advise officers of the government, or other boards within the state, in regard to location, drainage, water supply, disposal of excreta, heating, plumbing, sewerage systems, and ventilation of any public institution or building; it shall have general oversight and direction of the enforcement of the statutes' respecting the preservation of the health and the prevention of the spread of communicable diseases; it shall have general supervision of the work of local and county boards of health, hereinafter defined, and it shall, at the opening of each session of the legislative assembly, submit to the assembly, through the governor, a full report of all of its investigations, and such suggestions and recommendations which result from such investigations, and, also, such additional information and recommendations in the matter of public health in this state, as it shall deem proper.

The state board of health shall as a board exercise all powers and all duties found, conferred, prescribed or delegated, in any of the codes, session laws, and statutes of the state of Montana, which are, or have been delegated to the state board of health, as such, or which are, or have been, delegated, or assumed to be delegated, to any division, director or chief of division, bureau, or other functional unit, appointee, or employee, of the board, by acts of the legislative assembly, and all divisions, sections, units, directors, appointees and employees of the board shall exercise authority at all times in subordination to, and in compliance with, the orders and directives of the board in its administration of such laws, functions, powers and duties. The state board of health, as such is hereby charged with the responsibility of exercising the powers and functions, and discharging, executing and carrying out the duties, heretofore, or at any time hereafter, delegated to it by the legislative assembly, but nothing herein contained shall prevent the board from assigning the execution of its powers and duties, in specified detail, to its appointees and employees, subject at all times to the continuing control of the board. To the end of efficient administration, the board shall have power to direct the necessary internal organization of all employees, appointees, and functional divisions, units, and sections of the board. The board shall properly and effectively integrate and co-ordinate all personnel and services under its jurisdiction, in accord with efficient administrative, professional and technical practices, without regard to the title of persons, positions or functional divisions, sections or units which may have heretofore been authorized or recognized; provided, however, that nothing in this act shall be construed (a) as authorizing the exercise of powers or the discharge of duties not delegated to the board by act of the legislative assembly, or reasonably implied from delegated powers, or (b) as authorizing the board to create, establish or set up functions not delegated to it by acts of the legislative assembly. In all cases where the terms "divisions," "section" or "unit" of the board is referred to in the laws of this state, such terms shall be construed as referring to functions and powers of the board, and not to any numerical subdivision among the members of the board, or, in any case, to appointees, or employees of the board.

History: Ap. p. Sec. 2, p. 81, L. 1901; amd. Sec. 2, Ch. 110, L. 1907; re-en. Sec. 1475, Rev. C. 1907; re-en. Sec. 2448, R. C. M. 1921; amd. Sec. 1, Ch. 264, L. 1955. Cal. Pol. C. Sec. 2979.

References

See Campbell v. City of Helena, 92 M 366, 379, 16 P 2d 1 for a general discussion of the state board of health.

Collateral References

Health \$\equiv 6\$, 12 et seq., 20 et seq. 39 C.J.S. Health \$\\$ 2, 9, 10, 14 et seq.

Power of health commissioners to em-

ploy counsel. 2 ALR 1212.

General delegation of power to guard against spread of contagious disease. 8 ALR 836.

Validity, construction, and application of statutes, ordinances, and other regulations relating to transportation or disposal

of carcasses of dead animals not slaughtered for food. 121 ALR 732.

- 69-105.1. Additional powers of board. From and after the effective date of this act, in addition to other express powers and other implied powers herein granted to the board, and in addition to other express powers and other implied powers granted to the "state board of health of Montana" by existing provisions of law not repealed hereby, or hereafter granted to the board by law, the board shall have and exercise the following powers and duties:
- (1) To act in a directory and advisory capacity to the executive officer in all matters pertaining to public health.
- (2) To determine general policies to be followed by the board and its executive officer in administering public health laws of the state of Montana.
- (3) To hold hearings, administer oaths, subpoena witnesses and take testimony in all matters relating to the exercise and performance of powers and duties vested in or imposed upon the board.
- (4) To bring actions in the courts of this state for the enforcement of the public health laws, and to defend actions and suits brought against it.
- (5) To exercise all powers found in the following laws: Sections 69-105 to 69-126, 69-601 to 69-609, 69-701 to 69-712, 34-201 to 34-217, 10-401 to 10-408, 69-501 to 69-539, 69-901 to 69-903, 69-1001 to 69-1025, 69-1101 to 69-1116, 27-101 to 27-120, 27-201 to 27-212, 69-1201 to 69-1205 and 69-1301 to 69-1320.

History: En. Sec. 4, Ch. 57, L. 1949.

NOTE.—The references referred to above in subdivision (5) appeared in the original act as "Sections 2448 to 2484, inclusive, Revised Codes of Montana, 1935, as amended and supplemented; Chapters 231 through 239, inclusive, of the Political Code of the state of Montana, and Chapter 242 of the Political Code of the state of Montana, including sections 2485 through 2619, inclusive, Revised Codes of Montana, 1935, as amended and supplemented, and sections 2641 through 2657, inclusive, Revised Codes of Montana, 1935, as amended and supplemented." Sections 69-105 to 69-126, 69-601 to 69-609 and 69-701 to 69-712 comprise sections 2448 to 2484; sections 34-201 to 34-217 comprise Chapter 231; sections 10-401 to 10-408 comprise Chapter 232; sections 69-501 to 69-539 comprise Ch. 44 of Laws 1943 which repealed and

superseded Chapter 233; sections 69-901 to 69-903 comprise Chapter 234; sections 69-1001 to 69-1025 comprise Chapter 235; sections 69-1101 to 69-1116 comprise Chapter 236; sections 27-101 to 27-120 comprise Chapter 237; sections 27-201 to 27-212, comprise Ch. 263 of Laws 1947 which repealed and superseded Chapter 238; sections 69-1201 to 69-1205 comprise Chapter 239; sections 69-1301 to 69-1320 comprise Chapter 242.

Sections 69-106, 69-108, 10-401 to 10-408, and 69-903, referred to above, were repealed by Sec. 28, Ch. 264, Laws 1955. Section 27-114, referred to above, was repealed by Sec. 5, Ch. 119, Laws 1955.

Collateral References

Health € 6. 39 C.J.S. Health § 9.

69-105.2. Functions of and powers of any agency transferred to and continued in the state board of health of Montana created hereby. The board shall be the successor in every way, with respect to the functions, the powers and the duties prescribed by law upon the state board of health of Montana and its executive officer, as constituted before this act becomes effective, and every act done in the exercise of such functions, by or under authority of the board created hereby, shall have the same force and effect as if done by the former state board of health of Montana, or any section,

division or agency thereof in which such functions and powers have heretofore been vested, or such duties imposed and laid.

History: En. Sec. 5, Ch. 57, L. 1949.

69-105.3. Legal advisor. The attorney general of Montana shall be legal advisor for the board and shall, as a matter of course, defend it in all actions and proceedings brought against it, and shall, at its request, bring all suits and actions ordered by it. The county attorney of the county in which a cause of action may arise, shall bring any action requested by the board to abate a condition which exists in violation of, or to restrain or enforce any action which is in violation of, or to prosecute for the violation of, or for the enforcement of, the public health laws of Montana. If the county attorney fails to so act, the board may bring any such action and shall be represented by the attorney general or, with the approval of the attorney general, may be represented by special counsel who shall be compensated out of the general appropriation made by the legislative assembly for the board.

History: En. Sec. 6, Ch. 57, L. 1949.

Collateral References
Attorney General ≈6.
7 C.J.S. Attorney General § 5.

69-105.4. Laboratory services. The state board of health is hereby authorized and directed to organize and administer such laboratory services as it deems necessary to carry out any duties and responsibilities in the field of public health which have been delegated to it by the legislative assembly of Montana; and for such purposes to provide equipment, facilities, and qualified personnel, the technical qualifications of which personnel the board shall determine and, as may be permitted from time to time within appropriations by the legislative assembly. The laboratory services shall be organized so as to provide for technical procedures in the fields of bacteriology, serology, chemistry, and toxicology, with particular reference to subjects under the board's powers as assigned to it by the laws of Montana including water supplies, sewage and waste disposal, foods, drugs, poisons, insecticides, fungicides, rodenticides, industrial hygiene, communicable disease and other diseases or conditions which may from time to time afflict mankind in the state of Montana and be susceptible to control, suppression or eradication, or require study and analysis to determine the existence of circumstances which are, may be, or are alleged to be, detrimental to health.

History: En. Sec. 2, Ch. 264, L. 1955.

69-106. (2449) Repealed—Chapter 264, Laws of 1955.

Repeal health, was repealed by Sec. 28, Ch. 264, This section (Sec. 3, Ch. 110, L. 1907), relating to meetings of the state board of

69-107. (2450) Power to make and enforce rules and regulations. The state board of health shall have power to promulgate and enforce such rules and regulations for the better preservation of the public health in contagious and epidemic diseases as it shall deem necessary, and also regarding

the causes and prevention of diseases, and their development and spread; and any person or corporation refusing, after notice in writing from the secretary of the state board of health, or from any local or county board of health, of such rules and regulations, to comply therewith, within a reasonable time, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined in a sum not less than ten nor more than one hundred dollars, with costs of prosecution; and it shall be the duty of the secretary of the state board of health to prepare and distribute to local boards of health, physicians, and other persons requesting them, such printed circulars as the board may direct, and such rules and regulations as the board may promulgate as aforesaid.

History: En. Sec. 4, Ch. 110, L. 1907; Sec. 1477, Rev. C. 1907; re-en. Sec. 2450, R. C. M. 1921. Cal. Pol. C. Sec. 2984.

References

Campbell v. City of Helena, 92 M 366, 379, 16 P 2d 1.

Collateral References

Health ≈ 20 et seq. 39 C.J.S. Health §§ 2, 14 et seq. 25 Am. Jur. 298, Health, §§ 19 et seq.

69-108. (2451) Repealed—Chapter 264, Laws of 1955.

Repeal

This section (Sec. 7, Ch. 110, L. 1907), relating to compensation and expenses of

members of the state board of health, was repealed by Sec. 28, Ch. 264, Laws 1955, effective March 10, 1955.

69-109. (2452) Officers and corporations to furnish information when requested by board. In order to afford the better advantage for obtaining knowledge to be incorporated with that collected through special investigations and other sources, all officers of the state, the physicians of all incorporated companies, and the president or agent of any company chartered, organized, or transacting business under the laws of this state, as far as it is practicable, shall furnish to the state board of health any information bearing upon public health which may be requested by said board, for the purpose of enabling it better to perform its duties of collecting and distributing useful information on this subject.

History: En. Sec. 8, Ch. 110, L. 1907; Sec. 1481, Rev. C. 1907; re-en. Sec. 2452, R. C. M. 1921.

69-110. (2453) Inspection and regulation of schoolhouses, churches and places of public resort. The state board of health shall prepare and issue to the local and county boards of health regulations for the lighting, heating, and ventilating of schoolhouses, and shall cause sanitary inspection to be made of schoolhouses, churches, and all places of public resort, and make such regulations concerning the same as it may deem necessary for the safety of the persons who may attend school or services therein or resort thereto. All schoolhouses, churches, or public buildings hereafter erected shall conform to the regulations of the state board of health in respect to all sanitary conditions; and all persons, corporations, or committees intending to erect any such building hereinbefore named, shall submit plans thereof, so far as to show the method of heating, ventilating, plumbing, and sanitary arrangements, to the secretary of the state board of health, and secure his approval thereof, or the approval of the state board of health on appeal

from the decision of its secretary, before erecting said building, and shall conform strictly to all the requirements of the said board in the respects aforesaid, and any person, corporation, or committee that shall erect any such building without such approval, and without complying with such requirements, shall be guilty of a misdemeanor; and shall also make such building conform to the requirements of said board, before the same shall be used for any of the purposes above mentioned; and any such use of said building until such requirements have been complied with shall be a misdemeanor.

History: En. Sec. 9, Ch. 110, L. 1907; Sec. 1482, Rev. C. 1907; re-en. Sec. 2453, R. C. M. 1921; amd. Sec. 1, Ch. 191, L. 1947.

Sanitary Conditions

The state board of health has authority by virtue of this section and section 69-111, to compel the school board in a thickly settled community, in which the school buildings are not provided with adequate toilet facilities, whereby the health of the entire community is endangered, to furnish proper sanitary means by install-

ing proper toilets and either connecting the same with public sewers or with a private sewer system. City of Kalispell v. School District, 45 M 221, 229, 122 P 742.

References

Campbell v. City of Helena, 92 M 366, 379, 16 P 2d 1.

Collateral References

Health \$\sim 32.
39 C.J.S. Health \$\\$ 23, 24.
25 Am. Jur. 302, Health, \$\\$ 24 et seq.

69-111. (2454) Public buildings found in unsanitary condition may be declared a public nuisance. When any schoolhouse, church, theater or other public building in the state shall, on inspection by a local, county, or state health officer, be found to be in such unsanitary condition as to endanger the health of those who may frequent the same, such health officer shall give to the owner, or those in charge of such building, notice to place the same in proper sanitary condition in such manner as he shall direct, and within a reasonable time; and should the owner, agent or other person in charge of such building fail, neglect, or refuse to place the said building in proper sanitary condition, in such manner as shall be directed, and within the time specified in said notice, then such building shall be deemed a public nuisance, and the local or county health officer or the secretary of the state board of health shall institute action against the same, in the manner now provided by law for the abating of a public nuisance.

History: En. Sec. 10, Ch. 110, L. 1907; Sec. 1483, Rev. C. 1907; re-en. Sec. 2454, R. C. M. 1921.

Cross-Reference

Dilapidated buildings as nuisances, order of state fire marshal, sec. 82-1219.

Collateral References

9 Am. Jur. 209, Buildings, § 14; 25 Am. Jur. 304, Health, § 26.

Power of state to require changes in buildings previously erected in order to comply with new requirements and standards for protection of health and safety. 109 ALR 117.

69-112. (2454.1) Tourist camp ground defined. The term, tourist camp ground, as used in this act, shall include and mean any tract or parcel of land owned, maintained or used for public camping, primarily by automobile tourists whether the same shall be owned, used or maintained by any person, persons, copartnership, firm or corporation upon which tract of land persons may camp or secure cabins or tents, either free of charge or by the payment of a fee, and whenever the words, tourist camp ground, are used

in this act they shall be construed to mean a tourist camp ground as herein described and defined.

History: En. Sec. 1, Ch. 80, L. 1929.

Collateral References

Health \$31. 39 C.J.S. Health \$\$ 21, 25, 29.

69-113. (2454.2) Regulation of tourist camp grounds by state board of health. The state board of health is hereby empowered, authorized, and directed to make such rules and regulations for the conducting of such tourist camp ground as in its judgment shall be necessary to insure the greatest degree of sanitation, and as will most effectively conserve the health and promote the welfare of persons visiting and patronizing such camps, and monthly inspection shall be made of tourist camps by local and county health officers during the months of May, June, July, August and September and such additional inspections as may be required by the state board of health

History: En. Sec. 2, Ch. 80, L. 1929.

Collateral References

Establishment, maintenance and regulation of tourist or trailer camps by public authorities. 22 ALR 2d 774.

69-114. (2454.3) License for tourist camp ground—fee—sanitation required. It shall be unlawful for any person, persons, copartnership, firm or corporation to conduct a tourist camp ground without having a license issued by the state board of health of Montana. Licenses shall be furnished upon request for that purpose. An annual fee of two dollars (\$2.00) shall be required for each license. Licenses shall be made to expire on the last day of December of the current year in which they are issued. No license shall be issued to any tourist camp ground that is conducted in a grossly unsanitary manner.

History: En. Sec. 3, Ch. 80, L. 1929.

69-115. (2454.4) Violations and penalty—disposition of fines. Any person, persons, copartnership, firm or corporation who operates a tourist camp ground without first obtaining a license from the state board of health, or who operates a tourist camp ground after his license has been revoked shall be guilty of a misdemeanor and upon conviction, shall be punished by a fine of not less than twenty-five dollars (\$25.00) or more than one hundred dollars (\$100.00). All fines collected for violations of the provisions of this act shall be paid to the county treasurer of the proper county, who shall remit the same to the state treasurer of the state of Montana, and said moneys shall be placed to the credit of the general fund of the state.

History: En. Sec. 4, Ch. 80, L. 1929.

Collateral References

Health € 37 et seq. 39 C.J.S. Health § 30 et seq.

69-116. (2454.5) Cancellation of license—hearing—disposition of license fees. If as a result of inspection by an authorized representative of the state board of health, any licensed tourist camp ground found not to be conducted within a reasonable degree of compliance with the rules and regu-

lations of the state board of health, the license may be canceled by the secretary of the state board of health, provided that any licensee whose license is so canceled, shall be entitled to a hearing before the state board of health to show cause, if any, why his license should not be canceled. In such case licensee must make written request to the secretary of the state board of health for a hearing within five days after notice has been received that his license has been canceled. Fees collected by the state board of health for licenses issued shall be transmitted to the state treasurer and placed in the general fund of the state.

History: En. Sec. 5, Ch. 80, L. 1929.

69-117. (2454.6) Rules and regulations of board of health to be posted at camp grounds. The rules and regulations promulgated by the state board of health covering the maintenance, operation and conduct of such tourist camp ground, shall be printed and kept posted in conspicuous places on the premises of each camp ground, and it shall be the duty of each owner or caretaker to see that such rules and regulations are posted and kept posted during the operation and maintenance of such tourist camp ground.

History: En. Sec. 6, Ch. 80, L. 1929.

69-118. (2455) Contagious disease—restrictions of travelers. The state board of health shall have the power and it shall be their duty to issue and enforce reasonable rules for the restriction and prohibition of any person or persons suffering from a communicable, infectious, or contagious disease, traveling on public conveyances, and shall issue reasonable rules and regulations for the disinfection of passenger cars or any other public conveyance in which any person or persons, suffering from contagious, infectious, or communicable disease, has been traveling.

History: En. Sec. 25, Ch. 110, L. 1907; Sec. 1498, Rev. C. 1907; re-en. Sec. 2455, R. C. M. 1921. Collateral References
Health ≈ 22 et seq.
39 C.J.S. Health § 12 et seq.
25 Am. Jur. 303, Health, § 25.

69-119. (2456) Rules and regulations for transportation of dead bodies. The state board of health shall make all needful rules and regulations for the transportation of dead bodies, and such rules and regulations shall, so far as shall be deemed practicable, be in conformity with similar rules and regulations now in force in other North American states and countries, and to this end they may establish a system of licensing embalmers and undertakers.

History: En. Sec. 26, Ch. 110, L. 1907; Sec. 1499, Rev. C. 1907; re-en. Sec. 2456, R. C. M. 1921. Collateral References Health 35. 39 C.J.S. Health §§ 20, 27, 29.

Cross-Reference

Licensing of embalmers and undertakers, secs. 82-701 to 82-711.

69-120. (2457) Definition of "communicable disease." The term "communicable disease" as used in this act, shall be understood to include the following diseases: Smallpox, diphtheria, membraneous croup, so-called

scarlet fever, "spotted" or "tick" fever, typhus fever, enteric or typhoid fever, cerebrospinal meningitis, measles, whooping cough, mumps, anteriorpoliomyelitis, or infantile paralysis, and tuberculosis and other diseases as the state board of health may hereafter designate.

History: En. Sec. 27, Ch. 110, L. 1907; Sec. 1500, Rev. C. 1907; amd. Sec. 1, Ch. 15, L. 1913; re-en. Sec. 2457, R. C. M. 1921.

25 Am. Jur., Health, p. 303, § 25; p. 309, §§ 32 et seq.

Collateral References

Health == 22 et seq. 39 C.J.S. Health § 12 et seq.

Right of one detained pursuant to quarantine to habeas corpus. 2 ALR 1542. Quarantine of typhoid carrier. 22 ALR

69-121. (2458) Quarantine measures. The state board of health, in case of danger of infection from smallpox, or any other infectious or contagious disease, dangerous to the public health, may institute and enforce quarantine measures against any state as it may deem necessary, and they shall enforce such quarantine measures against any city or county as they may deem necessary in order to prevent the spread of dangerous, infectious, or contagious diseases, and if any person or corporation refuses or neglects to comply with such quarantine regulations, he shall, upon conviction, pay to the treasurer of the state a fine of not less than ten dollars or more than one hundred dollars.

History: En. Sec. 32, Ch. 110, L. 1907; Sec. 1505, Rev. C. 1907; re-en. Sec. 2458, R. C. M. 1921.

Health € 24.

39 C.J.S. Health §§ 15, 17. 25 Am. Jur. 309, Health, §§ 32 et seq.

Collateral References

References

Ruona v. City of Billings, 136 M 554, 323 P 2d 29, 31.

(2459) Secretary authorized to act for state board in emergency cases. In case of imminent danger from infectious or contagious disease, where the health of the people would be endangered from the delay of action necessary to call a meeting of the state board of health, the secretary of the state board of health shall have the full power of the state board of health to act in such matter, until such time as a meeting of the state board of health may be duly called.

History: En. Sec. 37, Ch. 110, L. 1907; Sec. 1510, Rev. C. 1907; re-en. Sec. 2459, R. C. M. 1921.

69-123. (2460) **Penalties.** Whoever shall knowingly violate any of the provisions of this act, or any rule or regulation of any county, city, or state board of health, made in accordance with the provisions of this act, the penalty for which is not herein specifically provided, shall be guilty of a misdemeanor.

History: En. Sec. 38, Ch. 110, L. 1907; Sec. 1511, Rev. C. 1907; re-en. Sec. 2460, R. C. M. 1921.

(2461) Disposal of indigent lepers. When a case of leprosy occurs in an indigent person in the state of Montana, it shall be the duty of the state board of health, through its secretary, to communicate with the United States public health service, for the purpose of getting such case admitted to the federal home for lepers at Carville, Louisiana. If it is found that the case can be admitted, the state board of health shall have authority, and is empowered, to send the case to such institution at the expense of the county in which the case occurred and such case shall be transported in accordance with the rules and regulations of the United States public health service, relative to the interstate transportation of lepers.

History: En. Sec. 1, Ch. 124, L. 1921; re-en. Sec. 2461, R. C. M. 1921.

Collateral References
Asylums©=2 et seq.
7 C.J.S. Asylums § 4 et seq.

(2462) Sewer system to be approved by board of health—appeal to district court. Whenever any city, town, or corporation or person shall hereafter contemplate the construction of any sewer system that will empty into any stream or source of water supply in this state, they shall submit a plan of such proposed system to the state board of health, and said board shall cause a thorough investigation to be made, and if after such an investigation they shall determine that such sewerage will so pollute the waters of any stream or source of water supply as to endanger the health or lives of the citizens of this state, or any of them, they shall submit to the judge of the district court of the district in which such proposed sewerage system is located, the evidence on which their findings are based, and if said judge, upon that evidence, and such other evidence as the judge may receive on a hearing at which all parties in interest may be heard and present evidence, if they desire, shall find that the action of the state board of health is just and unbiased, he shall issue an order preventing the construction of such sewerage system, except under such conditions as the state board of health may designate.

A city or town may appeal to the district court of the county in which such city or town may be located, from any order of the state board of health affecting such city or town, at any time within thirty days after the service on the city or town council of such order. Such appeal may be taken by filing notice thereof in such court either before or after serving a copy of such notice on any member of the state board of health. The court may order pleadings to be filed to present the issues, and such case shall be tried de novo the same as an appeal from a justice court.

History: En. Sec. 36, Ch. 110, L. 1907; Sec. 1509, Rev. C. 1907; amd. Sec. 1, Ch. 66, L. 1911; re-en. Sec. 2462, R. C. M. 1921.

Collateral References Health €=33. 39 C.J.S. Health §§ 21, 28, 29.

References

Campbell v. City of Helena, 92 M 366, 379, 16 P 2d 1.

69-126. (2463) Adulterated and misbranded foods, drugs, etc., publication of list. It shall be the duty of the state board of health to furnish to the clerk of each county in the state a certified list of the adulterated and misbranded foods and products entering into the preparation of foods, beverages, candies, drugs, and all other products and preparations under the jurisdiction of said board of health, as found by the analysis and investigation of said board. Said list shall show the brand and name of

the article, the manufacturer or jobber, and the reason for classing the same as illegal, together with any necessary comments thereon. The county clerk of each county, where said misbranded food is found, shall cause the said list to be printed in the official papers of such county. Such publication shall be made not more than four times each year, and shall be paid for by such county at the rate allowed by law for publishing the proceedings of the board of county commissioners; provided, that whenever the board of health, or their assistants, shall discover any foods, beverages, candies, drugs, or other products or preparations under the jurisdiction of said board, to be adulterated or misbranded, the said board of health shall immediately notify the party responsible for placing the same upon the market, and said party shall have ten days in which to show cause why the results of said investigation or analysis should not be published.

History: En. Sec. 1, Ch. 103, L. 1917; re-en. Sec. 2463, R. C. M. 1921.

Collateral References

Adulteration ≈1 et seq. 2 C.J.S. Adulteration § 19 et seq.

22 Am. Jur., Food, p. 821, §§ 20 et seq.; p. 828, §§ 31 et seq.; p. 830, §§ 35 et seq.; p. 866, §§ 78 et seq.

Power to compel disclosure of ingredients or formula of patent or proprietary medicine. 1 ALR 1476.

Constitutionality of regulations as to milk. 18 ALR 235; 42 ALR 556; 58 ALR 672; 80 ALR 1225; 101 ALR 64; 110 ALR 644; 119 ALR 243 and 155 ALR 1383.

Validity of regulations as to the ingredients of nonalcoholic drinks. 41 ALR 930.

Preservative as adulterant within statute in relation to food. 50 ALR 76.

Constitutionality of provisions relative to oleomargarine. 53 ALR 474.

Constitutionality of requirement of disclosure by label of materials or ingredients of articles sold or offered for sale. 57 ALR 686.

Statutes or ordinances in relation to confectionery. 58 ALR 293.

Constitutionality of statutes relating to grading, packing, or branding of farm products. 73 ALR 1445.

What substances or commodities are within statutory term "proprietary or patent medicine." 76 ALR 1207.

Constitutionality of statutes requiring notice by label or otherwise of the fact that product is imported, or as to the place of production. 83 ALR 1409 and 124 ALR 572.

Statutory provisions relating to purity of food products as applicable to foreign substances which get into product as result of accident or negligence, and not by purpose or design. 98 ALR 1496.

Validity of statutes or ordinances relating to ice cream or other frozen milk products. 111 ALR 112.

Constitutionality of statutes, ordinances, or other regulations against adulteration of food products as applied to substances used for preservative purposes. 114 ALR 1214.

Construction and application of regulations as to milk. 122 ALR 1062.

Validity, construction, and application of statutes or ordinances relating to inspection of food sold at retail. 127 ALR 322.

Penal offense predicated upon violation of food law as affected by ignorance or mistake of fact, lack of criminal intent, or presence of good faith. 152 ALR 755.

or presence of good faith. 152 ALR 755.
Coloring matter as forbidden adulteration of food. 56 ALR 2d 1129.

69-127. Persons subject to epileptic type seizures—report of physicians required—recommendations as to licensing persons to drive. Whenever a physician or other practitioner authorized to diagnose epilepsy or epileptic type seizures treats or attends any person diagnosed as being subject to epileptic type seizures or similar disorders characterized by lapse of consciousness or control, either temporary or prolonged, which is or may become chronic, said physician or other practitioner shall report the full name, address, sex and date of birth of the person so diagnosed immediately to the local health officer in writing. The local health officer shall in turn forward such reports to the executive officer of the state board of health

not later than Saturday of each week. The executive officer of the state board of health shall forward the reports to the Montana highway patrol board at least once each month. The executive officer of the state board of health may make recommendations to the said board as to the licensing of the person or persons so reported to drive or operate motor vehicles on the public highways of the state of Montana and said officer may require the reported person to authorize a doctor who is familiar with such case to forward a certificate or case report to the executive officer of the state board of health, or require that a physical examination be made by a medical doctor designated by the executive officer of the state board of health and forwarded to the executive officer of the state board of health within ten (10) days. The person reported as being subject to such seizures or lapse of consciousness or control may himself or herself cause a written report concerning his or her affliction or disability to be forwarded to the executive officer of the state board of health by a doctor of his choice. All reports required by this section shall be confidential and used by the board solely to determine the qualifications of such persons to operate motor vehicles upon the highways of this state.

History: En. Sec. 1, Ch. 59, L. 1955.

CHAPTER 2

INDUSTRIAL HYGIENE

Section 69-201. Industrial hygiene.

69-202. Powers.

69-203. Blanks for reporting occupational diseases.69-204. Investigating reports of occupational diseases.

69-205. Periodic compilation of reports of occupational diseases.

69-206. Occupational diseases defined.

69-207. Duty of physicians and others to report cases—reports private records.

69-208. Penalty.

69-201. Industrial hygiene. The state board of health, as such, shall possess, exercise and administer all of the powers, functions and authority, and shall carry out, discharge and execute all of the duties, in the field of industrial hygiene, as set forth in sections 69-202, 69-203, 69-204, 69-205, 69-206, 69-207, and 69-208. The expression in such sections "division of industrial hygiene" is hereby defined to mean the state board of health of the state of Montana, as a board, in the field of industrial hygiene as prescribed by said sections.

History: En. Sec. 1, Ch. 127, L. 1939; amd. Sec. 3, Ch. 264, L. 1955.

Collateral References

Health €3. 39 C.J.S. Health §§ 4, 7.

69-202. Powers. The division of industrial hygiene shall have the following powers:

- (1) To make studies of industrial hygiene and occupational disease problems in the industries of Montana;
- (2) To keep and maintain complete records of its studies, recommendations and other activities;
- (3) To make investigations of the sanitary conditions under which the men and women work in the various industries of the state;

- (4) To make and enforce regulations for the correction of unsanitary conditions found;
- (5) To report to the industries concerned the findings of such investigations and to work with such industries to remedy unsanitary conditions;
- (6) To employ such help as may be necessary to make the investigations and enforce the regulations and as is justified by the appropriation.

History: En. Sec. 2, Ch. 127, L. 1939.

69-203. Blanks for reporting occupational diseases. The secretary of the division of industrial hygiene is hereby authorized and directed to design and provide suitable blanks for reporting occupational diseases and prepare instructions for their use, and to furnish them free of charge to all registered physicians, medical clinics, hospitals, industrial plants and labor unions who may request them.

History: En. Sec. 3, Ch. 127, L. 1939.

69-204. Investigating reports of occupational diseases. Whenever the secretary of the division of industrial hygiene receives a report that there is within the state of Montana a case of occupational disease, or a death caused by occupational disease, he may cause an investigation to be made to determine the authenticity of the report and the cause of the disease.

History: En. Sec. 4, Ch. 127, L. 1939.

69-205. Periodic compilation of reports of occupational diseases. Once each year and at such other times as is deemed proper, the division of industrial hygiene shall compile statistical summaries of all occupational diseases reported, together with the type of employment leading to the occurrence of such diseases and shall disseminate to all employers of this state instructions and information deemed proper and expedient to prevent the occurrence or recurrence of occupational diseases.

History: En. Sec. 5, Ch. 127, L. 1939.

- 69-206. Occupational diseases defined. An occupational disease, for the purpose of this statute, is an illness of the body which has the following characteristics:
 - (1) It arises out of and in the course of the patient's occupation.
- (2) It is caused by a frequently repeated or a continuous exposure to a substance or to a specific industrial practice which is hazardous and which has continued over an extended period of time.
- (3) It presents symptoms characteristic of an occupational disease which is known to have resulted in other cases from the same type of specific exposure.
- (4) It is not the result of ordinary wear and tear of industrial occupation or the general effect of employment or the kind of illness that results from contacts or activities in life outside of the patient's occupational pursuits.

History: En. Sec. 6, Ch. 127, L. 1939.

69-207. Duty of physicians and others to report cases—reports private records. From and after the passage and approval of this act, every

physician, hospital or clinic superintendent, and the state coal and quartz mine inspectors, having knowledge of a case of occupational disease shall, upon request of the secretary of the division of industrial hygiene of the state of Montana, and within ten (10) days after such request, report the same to the division of industrial hygiene of the state of Montana on a form provided by said division, giving the name and address of the patient, the name and business address of the employer or employers, the business of the employer, the place of the patient's employment, the length of time of his employment in the place where he took ill, the nature of the disease, and any other information required by the division of industrial hygiene. All such reports and all records and data of the division of industrial hygiene of the state of Montana pertaining to such diseases are hereby declared not to be public records or open to public inspection, and shall not be admissible as evidence in any action at law or in any hearing under the Workmen's Compensation Act of the state of Montana.

History: En. Sec. 7, Ch. 127, L. 1939.

Collateral References

Health \$34. 39 C.J.S. Health \$\$ 19, 26.

69-208. Penalty. Any physician, surgeon, hospital or clinic superintendent in charge of a hospital or of clinic records, or any other person required to make such report hereunder, who shall fail to make any report required under the provisions of this act, or who shall willfully make any false statement in such report, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not more than five hundred dollars (\$500.00).

History: En. Sec. 8, Ch. 127, L. 1939.

Collateral References

Health \$37. 39 C.J.S. Health \$\\$30, 31.

CHAPTER 3

TUBERCULOSIS CONTROL

Section 69-301. Tuberculosis control.

69-302. Repealed.

69-303. Board of health authorized to expend funds for control of tuberculosis.

69-304. Statement of policy.

69-305. Definitions.

69-306. Rules and regulations.

69-307. Application to require person to submit to procedures for diagnosis—
application to remove to facility persons who are menace to public health,

69-308. Applications where person refuses to submit to procedures for diagnosis or refuses to enter or stay in hospital.

69-309. Hearing on application—time—summons.

69-310. Order of court after hearing—commitment or requiring examination—dismissal.

69-311. Certified copies of order of commitment—retaining person in facility—act not to require medical or surgical treatment without consent.
69-312. Warrant to transport person committed—transportation of female.

69-313. Application for release—time for hearing—hearing—order.

69-314. Finding that person no longer a public health menace—discharge—filing.

69-315. Transfer of person to another hospital—authority—notice.

69-316. Records of court—costs and expenses—payment.

69-317. Expenses of removal to facility—charge for maintenance, care and treatment.

69-318. Quarters and facilities.

69-319. Effect of act on existing laws relating to communicable diseases and tuberculosis.

69-301. Tuberculosis control. The state board of health is hereby invested with the function of studying and collecting all relevant data pertaining to the appearance and incidence of tuberculosis within this state, and with promulgating such measures and practices as may make for its control, and the recovery of persons afflicted thereby, and to such ends, the board shall possess, exercise, and administer all of the powers, and shall carry out, discharge and execute all of the duties, in the field of tuberculosis control, as set forth in section 69-303. The board shall appoint a technically trained and competent person who shall exercise the functions and carry out the duties assigned to him by the board in compliance with its orders, rules and regulations.

History: En. Sec. 1, Ch. 170, L. 1945; amd. Sec. 4, Ch. 264, L. 1955.

69-302. Repealed—Chapter 264, Laws of 1955.

Repeal
This section (Sec. 2, Ch. 170, L. 1945), relating to the appointment of a state di-

rector of tuberculosis control, was repealed by Sec. 28, Ch. 264, Laws 1955, effective March 10, 1955.

69-303. Board of health authorized to expend funds for control of tuberculosis. The state board of health, in addition to the expenditure of state funds appropriated by the state for the control of tuberculosis, is hereby authorized to receive, and through the executive officer of the state board of health, administer, use and expend all federal and other funds or moneys which from time to time may be made available to the state department of health for the control of tuberculosis in the state of Montana, and to allot and distribute such funds or moneys, or portions thereof, to county and other local departments, or other qualified agencies or to state, county or other tuberculosis hospitals or sanitariums within the state of Montana, for use in accordance with the rules and regulations of the state board of health; and to enter into such contracts with the federal or other agencies as the state board of health may deem appropriate, concerning the receipt, use and expenditure of any such funds or moneys.

History: En. Sec. 3, Ch. 170, L. 1945.

69-304. Statement of policy. Whereas, a comprehensive program of public health in the field of tuberculosis treatment has been carried out for years by governmental and private groups in this state, and whereas the failure of certain persons known to have tuberculosis in a communicable state and certain persons known to have been exposed to tuberculosis in a communicable state to comply with the laws of the state of Montana, and applicable rules and regulations of the Montana state board of health, pertaining to tuberculosis control constitutes a menace to public health and welfare, and adversely affects the citizens of the state, it is hereby declared to be the public policy of this state to protect the citizens of this state from persons having tuberculosis in a communicable state, to

provide a comprehensive program in the public interest for the prevention, abatement and eradication of this disease, to provide effective means for the carrying out and enforcement of such program, and to provide for co-operation with agencies of this state and the federal government in carrying out these objectives.

History: En. Sec. 1, Ch. 259, L. 1959.

69-305. Definitions. For the purpose of this act, the following words and phrases shall have the meaning ascribed to them in this section: (a) "Facility" means structures and equipment kept, used, maintained or contracted for by the state of Montana or local or federal agencies for the purpose of housing persons with communicable tuberculosis. (b) "Tuberculosis" means a disease caused by the tubercle bacillus that is characterized by the production of tuberculous lesions.

History: En. Sec. 2, Ch. 259, L. 1959.

69-306. Rules and regulations. The Montana state board of health shall promulgate rules and regulations, which rules and regulations shall be the basis for determination of the conclusive evidence of tuberculosis in a communicable state.

History: En. Sec. 3, Ch. 259, L. 1959.

69-307. Application to require person to submit to procedures for diagnosis—application to remove to facility persons who are menace to public The board of health of a city, county, district or state may, upon the recommendation of either a doctor of medicine licensed in Montana or a qualified doctor of medicine employed in the federal service in this state or the officer of health of the city, county, district or state, apply to the district court of the county in which the person resides or may be found, for an order (a) to require any person who is suspected on reasonable grounds of having tuberculosis in a communicable state or of having been exposed to communicable tuberculosis to submit to procedures required by the rules and regulations of the state board of health to establish the diag-To remove to the facility any person suffering from tuberculosis, in a communicable state, who has refused to enter, or absents himself from any hospital against the medical advice of the treating physician, health officer, or superintendent of facility, when in the opinion of the board of health of the city, county, district, or state such person is a menace to public health.

History: En. Sec. 4, Ch. 259, L. 1959.

Cross-Reference

Application of Montana Rules of Civil Procedure to commitment proceedings, sec. 93-2711-7.

69-308. Applications where person refuses to submit to procedures for diagnosis or refuses to enter or stay in hospital. If the board of health of the city, county, district, or state finds the person a public menace under this act, it shall file with the district court an application verified by its authorized representative, alleging (a) that such person is suspected on reasonable grounds of having tuberculosis in a communicable state or of

having been exposed to communicable tuberculosis and has refused to submit to procedures required by the rules and regulations of the state board of health to establish the diagnosis, or (b) that such person is suffering from tuberculosis in a communicable state, is a menace to public health and has refused to enter or has absented himself from a tuberculosis hospital against medical advice of the treating physician or the health officer. Such application shall also state the names of witnesses by which the facts alleged therein may be proved, at least one of whom shall be a licensed doctor of medicine.

History: En. Sec. 5, Ch. 259, L. 1959.

69-309. Hearing on application—time—summons. Upon the filing of the application provided for in this act, the district court shall hold a hearing on the application not less than three days nor more than seven days after personal service on the individual. A copy of the application together with summons stating time and place of hearing shall be served upon the person three days prior to the time set for hearing. The hearing shall be held in the district court. Except for good cause shown the district court has the authority to set the time for the hearing to be held in such other place in the county as conditions may require. On the day set for hearing the district judge shall proceed to examine the witness in attendance and further witnesses that such judge desires to call.

Summons shall be returned to the office of the district court at or before the time set for the hearing with the time and manner of service endorsed thereon.

History: En. Sec. 6, Ch. 259, L. 1959.

69-310. Order of court after hearing-commitment or requiring examination—dismissal. If upon hearing the district court shall find the essential allegations of the application true, and that the person has communicable tuberculosis and is a menace to public health, the said court shall then enter a commitment order committing the person to a facility. If, upon hearing, the district court shall find the essential allegations of the application true and that reasonable grounds exist to suspect that the person has communicable tuberculosis, or has been exposed to communicable tuberculosis, and is a menace to public health, the said court shall enter an order requiring the person to submit to an examination in accordance with the applicable rules and regulations of the Montana state board of health. If the person fails to comply with the order of the court for examination within the time set by said court then the court shall enter a commitment order committing the person to a facility. If the district court at the time of hearing finds the allegations of the application not sustained by the evidence, the application shall be dismissed and the person discharged.

History: En. Sec. 7, Ch. 259, L. 1959.

69-311. Certified copies of order of commitment—retaining person in facility—act not to require medical or surgical treatment without consent. If the district court enters an order committing the person to a facility,

certified copies thereof shall be delivered to the superintendent of the facility to which the person is committed and to the board of health filing the petition. Any person committed under the provisions of this act, shall remain in the facility to which committed until discharged. No person committed under the provisions of this act shall be required to submit to medical or surgical treatment in the facility to which he is committed without his written consent, or, if incompetent, without the written consent of his next of kin, or duly appointed guardian, or if a minor, without the written consent of his natural or appointed guardian. The superintendent of such facility and his assistants may use such reasonable means as may be necessary to keep such person within the facility and to require him to comply with the rules and regulations promulgated by the facility for the care of such persons.

History: En. Sec. 8, Ch. 259, L. 1959.

69-312. Warrant to transport person committed—transportation of female. When an order committing a person is issued to a facility, the district court shall also issue a warrant directed to the sheriff of the county in which the proceedings are held to transport such person to the designated facility. In no case shall a female be so transported unless she is accompanied by her husband, brother, father, or son, or a female attendant of reputable character and mature judgment.

History: En. Sec. 9, Ch. 259, L. 1959.

69-313. Application for release—time for hearing—hearing—order. Any time after one hundred eighty (180) days any patient committed to a facility under this act may apply to the district court in which commitment order was entered to order his release for the reason that he is no longer suffering from tuberculosis in a communicable state and he therefore is no longer a menace to public health. In not less than three (3) days nor more than seven (7) days after service of the notice the district court shall hold a hearing to determine whether the person committed is still a menace to public health by reason of his tuberculous condition. After a hearing the district court shall enter an order releasing the person from his commitment, if applicant's disease is found to be noncommunicable, and directing his discharge; if the district court shall not so determine, it shall enter an order dismissing the application for the release and remand the person to the facility to which he was committed.

History: En. Sec. 10, Ch. 259, L. 1959.

Cross-Reference

Application of Montana Rules of Civil Procedure to this section, sec. 93-2711-7.

69-314. Finding that person no longer a public health menace—discharge—filing. If the superintendent of the facility and the board of health who made the initial application find and concur that the person committed is no longer a menace to public health by reason of his tuberculous condition, they shall file with the district court a notice containing this finding and notice of date of release of the person from the facility.

History: En. Sec. 11, Ch. 259, L. 1959.

69-315. Transfer of person to another hospital—authority—notice. When it is in the best interest of the person, the superintendent of the facility may authorize the transfer of the person from the facility to which he was committed to another state, county, city, federal or to another hospital approved by the state board of health. The district court and the state board of health who made the initial application shall be notified of this transfer.

History: En. Sec. 12, Ch. 259, L. 1959.

- 69-316. Records of court—costs and expenses—payment. The records of the district court shall contain a complete record of all proceedings had under the provisions of this act. The cost and expenses to be paid shall be as follows:
- (a) To sheriffs or their deputies, the same fees allowed for similar service in the district court.
- (b) To the doctors of medicine, not to exceed two, such fee as the district court may in its discretion direct.
- (c) To other witnesses the same fees and mileage as for attendance in the district court; provided all witnesses fees shall be paid upon the approval of the district judge to the person other than the sheriff or his deputies for taking a person committed to a facility or removing one therefrom upon the warrant of the district judge, the actual necessary expense incurred specifically itemized and verified by his oath and approved by the district judge.

Such fees and expense, together with all costs in the district court, shall be paid from the treasury of the county from which such person is committed.

History: En. Sec. 13, Ch. 259, L. 1959.

69-317. Expenses of removal to facility—charge for maintenance, care and treatment. The expenses of removal of any person to a facility shall be borne by the county from which such person was committed. These expenses shall be paid from the general fund appropriations of the county or from the funds derived from such as may be designated. The charge for the care, treatment, and maintenance of the person at the state sanitarium shall be at the rate determined paid for according to existing law.

History: En. Sec. 14, Ch. 259, L. 1959.

69-318. Quarters and facilities. The state board of examiners shall provide and maintain at the state facility, Montana state tuberculosis sanitarium, quarters as may be necessary to carry out the provisions of this act. The counties shall provide and maintain facilities as may be necessary to carry out the provisions of this act.

History: En. Sec. 15, Ch. 259, L. 1959.

69-319. Effect of act on existing laws relating to communicable diseases and tuberculosis. This act is intended to supplement existing laws relating to communicable tuberculosis. Nothing in this act shall modify, supersede, or change any existing laws relative to communicable disease.

History: En. Sec. 16, Ch. 259, L. 1959.

CHAPTER 4

DENTAL HEALTH

Section 69-401. Dental health.

69-402. Director-qualifications.

69-403. Duties, director of dental health.

69-404. Rules and regulations by state board of health.

69-401. Dental health. The state board of health is hereby directed and authorized to develop and administer a program of dental public health. The state board of health shall appoint a full-time director of dental health, qualified as prescribed by section 69-402, and who shall be under its direct supervision. The state board of health shall also provide such other staff and facilities as are needed in carrying out the purposes of this act.

History: En. Sec. 1, Ch. 125, L. 1943; amd. Sec. 5, Ch. 264, L. 1955.

69-402. Director—qualifications. The director of dental health shall be a dentist who is duly licensed in some state or territory or the District of Columbia, to practice his profession, and who shall have had at least one (1) school year of training in an accredited school of public health.

History: En. Sec. 2, Ch. 125, L. 1943; amd. Sec. 1, Ch. 189, L. 1947.

69-403. Duties, director of dental health. The duties of the director of dental health shall be the development and promotion of those activities which result in the protection and improvement of the dental health of the people of the state.

History: En. Sec. 3, Ch. 125, L. 1943; amd. Sec. 6, Ch. 264, L. 1955.

69-404. Rules and regulations by state board of health. The state board of health shall adopt rules and regulations for the proper administration of this act. The state board of health through the director of dental health shall have supervision over the dentists employed by municipalities, counties, health departments, school districts and state institutions.

History: En. Sec. 4, Ch. 125, L. 1943; amd. Sec. 7, Ch. 264, L. 1955.

CHAPTER 5

VITAL STATISTICS

Section 69-501. Definitions.

69-502. Vital statistics functions of board. 69-503. Publication of regulations. 69-504. Registration districts.

69-505. Appointment of state registrar—qualifications—compensation.

69-506. Duties of state registrar. 69-507. Local registrars and deputies. 69-508. Other employees.

69-509. Compulsory registration of births.

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- 69-536. Registration of divorces, annulments and adoptions.
- 69-537. Penalties.
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- 69-539. Short title.

69-501. Definitions. As used in this act:

- (1) "Vital statistics" includes the registration, preparation, and transcription, collection, compilation and preservation of data pertaining to births, adoptions, legitimations, deaths, stillbirths, marital status and data incidental thereto.
- (2) "Live birth" means the birth of a child who shows evidence of life after the child is entirely outside the mother.
- (3) "Stillbirth" means a birth after twenty (20) weeks of gestation which is not a live birth.
- (4) "Dead body" means lifeless human body or such parts of the human body or the bones thereof from the state of which it reasonably may be concluded that death recently occurred.
- (5) "Person in charge of interment" means any person who places or causes to be placed a stillborn child or dead body or the ashes, after cremation, in a grave, vault, urn or other receptacle, or otherwise disposes thereof.
- (6) "Physician" means a person legally authorized to practice medicine in this state.
 - "Board" means state board of health.

History: En. Sec. 1, Ch. 44, L. 1943. Earlier acts were Ch. 25, L. 1907; re-en. Secs. 1764 to 1781, Rev. C. 1907; re-en. Secs. 2515 to 2539, R. C. M. 1921 and R. C. M. 1935.

on Uniform State Laws in 1942 and adopted in the states of Idaho, Kansas, Louisiana, Minnesota, Missouri, Oregon, Tennessee, Wyoming, Alaska and Hawaii.

form Vital Statistics Act" approved by the National Conference of Commissioners

NOTE.—Uniform State Law. Sections 69-501 through 69-539 constitute the "Uni-

69-502. Vital statistics functions of board. The state board of health shall, as one of its functions:

- (1) Establish and identify an appropriate organizational unit under the board with the proper personnel, equipment and office space, to gather, collect, register, record, compile, preserve, analyze, use and make available for public use, vital statistics, as defined, and as set forth and referred to, in sections 69-501 through 69-539, except that the expression "Bureau of Vital Statistics," as used in any of said sections may be changed by the board, in establishing and identifying such organizational unit;
 - (2) Install a state-wide system of vital statistics;
- (3) Make and may amend necessary regulations, give instructions and prescribe forms for gathering, collecting, registering, recording, compiling, preserving, using and making use of public vital statistics;
- (4) Have charge and be the official custodian of all the files and records gathered under the provisions of said sections 69-502 through 69-539, and as the same may be amended and supplemented; and
 - (5) Enforcing this act, and the regulations made pursuant thereto.

History: En. Sec. 2, Ch. 44, L. 1943; amd. Sec. 8, Ch. 264, L. 1955.

Collateral References Health@=34. 39 C.J.S. Health § 26.

69-503. Publication of regulations. The regulations of the board shall take effect after passage and approval by the board.

History: En. Sec. 3, Ch. 44, L. 1943.

69-504. Registration districts. The board shall divide the state from time to time into registration districts which shall conform to political subdivisions, or combinations thereof, or of parts thereof.

History: En. Sec. 4, Ch. 44, L. 1943.

69-505. Appointment of state registrar—qualifications—compensation. The board shall appoint a state registrar of vital statistics, who shall be qualified in accordance with standards of education and experience as the board shall determine and fix his compensation.

History: En. Sec. 5, Ch. 44, L. 1943.

69-506. Duties of state registrar. The state registrar shall, under such rules and regulations as the board may prescribe keep and have immediate charge and custody, for the board, and subject to complete access by it at any time, its files and records in the field of vital statistics, aid the board in the enforcement of this act and the rules and regulations promulgated by it and in supervising local registrars and other persons required to comply with this act. The state registrar shall prepare for the board a biennial report of the administration of this act, in such detail and form as the board may prescribe.

History: En. Sec. 6, Ch. 44, L. 1943; amd. Sec. 9, Ch. 264, L. 1955.

69-507. Local registrars and deputies. The board on the recommendation of the state registrar shall appoint local registrars. A local registrar with the approval of the state registrar may appoint deputies. The local

registrars shall immediately report to the state registrar violations of this act or the regulations of the board.

History: En. Sec. 7, Ch. 44, L. 1943.

69-508. Other employees. The board shall provide other necessary assistance and determine the status, compensation and duties of persons thus employed.

History: En. Sec. 8, Ch. 44, L. 1943.

69-509. Compulsory registration of births. Within the time prescribed by the board a certificate of every birth shall be filed with the local registrar of the district in which the birth occurred, by the physician, midwife, or other legally authorized person in attendance at the birth; or if not so attended, by one of the parents.

History: En. Sec. 9, Ch. 44, L. 1943.

69-510. Local registrar to prepare birth certificate. If neither parent of the newborn child whose birth is unattended as above provided is able to prepare a birth certificate, the local registrar shall secure the necessary information from any person having knowledge of the birth and prepare and file the certificate. The board shall prescribe the time within which a supplementary report furnishing information omitted from the original certificate may be returned for the purpose of completing the certificate. Certificates of birth completed by the supplementary report shall not be considered "delayed" or "altered."

History: En. Sec. 10, Ch. 44, L. 1943.

- 69-511. Registration of foundlings—foundling report. (1) Whoever assumes the custody of a child of unknown parentage shall immediately report to the local registrar in writing: (a) the date and place of finding or assumption of custody; (b) sex; color or race; and approximate age of child; (c) name and address of the person or institution with whom the child has been placed for care, and (d) name given to the child by the finder or custodian.
- (2) The place where the child was found or custody assumed shall be known as the place of birth and the date of birth shall be determined by approximation.
 - (3) The report shall constitute the certificate of birth.
- (4) If the child is identified and a regular certificate of birth is found or obtained, the report shall be sealed and filed and may be opened only by court order.

History: En. Sec. 11, Ch. 44, L. 1943.

69-512. Registration of deaths and stillbirths. A certificate of every death or stillbirth shall be filed with the local registrar of the district in which the death or stillbirth occurred within three (3) days after the occurrence is known; or if the place of death or stillbirth is not known then with the local registrar of the district in which the body is found within

twenty-four (24) hours thereafter. In every instance a certificate shall be filed prior to interment or other disposition of the body.

History: En. Sec. 12, Ch. 44, L. 1943.

- 69-513. Death and stillbirth certificates. (1) The person in charge of interment shall file, with the local registrar of the district in which the death or stillbirth occurred or the body was found a certificate of death or stillbirth within three (3) days after the occurrence.
- (2) In preparing a certificate of death or stillbirth the person in charge of interment shall obtain and enter on the certificate the personal data required by the board from the persons best qualified to supply them. He shall present the certificate of death to the physician last in attendance upon the deceased or to the coroner having jurisdiction who shall thereupon certify the cause of death according to his best knowledge and belief. He shall present the certificate of stillbirth to the physician, midwife or other person in attendance at the stillbirth, who shall certify the stillbirth and such medical data pertaining thereto as he can furnish.
- (3) Thereupon the funeral director or person in charge of interment shall notify the appropriate local registrar, if the death occurred without medical attendance, or the physician last in attendance fails to sign the death certificate. Then the local registrar may complete the certificate on the basis of information received from relatives of the deceased or others having knowledge of the facts. If the circumstances suggest that the death or stillbirth was caused by other than natural causes, the local registrar shall refer the case to the coroner for investigation and certification.

History: En. Sec. 13, Ch. 44, L. 1943.

69-514. Delayed determination of cause of death. If the cause of death cannot be determined within three (3) days, the certification of its cause may be filed after the prescribed period, but the attending physician or coroner shall give the local registrar of the district in which death occurred, written notice of the reason for the delay, in order that a permit for the disposition of the body may be issued.

History: En. Sec. 14, Ch. 44, L. 1943.

69-515. Form of certificates. The forms of certificates shall include as a minimum the items required by the respective standard certificates as recommended by the United States bureau of the census subject to approval of and modification by the board. The form and use of such certificate shall be subject to the provisions of section 69-524.

History: En. Sec. 15, Ch. 44, L. 1943.

69-516. Certificates of evidence. Certificates filed within six (6) months after the time prescribed therefor shall be prima-facie evidence of the facts therein stated. Data therein pertaining to the father of a child are prima-facie evidence only if the alleged father is the husband of the mother; if not, the data pertaining to the father of a child are not evidence in any proceeding adverse to the interests of the alleged father, or of his heirs,

next of kin, devisees, legatees or other successors in interest, if the paternity is controverted.

History: En. Sec. 16, Ch. 44, L. 1943.

- **69-517. Certified copies.** (1) Subject to the requirements of sections 69-521, 69-523 and 69-524 the state registrar shall, upon request, furnish to any applicant a certified copy of any certificate, or any part thereof.
- (2) Copies of the contents of any certificate on file in the bureau of vital statistics or any part thereof, certified by the state registrar shall be considered for all purposes the same as the original, subject to the requirements of sections 69-521, 69-523 and 69-524.

History: En. Sec. 17, Ch. 44, L. 1943.

69-518. Fees for copies and searches. The board shall prescribe the fees if any to be paid for certified copies of certificates, or for search of the files or records when no certified copy is made. Subject to sections 69-521, 69-523 and 69-524, the United States bureau of the census may obtain transcripts, or without payment of fees, certified copies, provided the state is put to no expense in connection therewith.

History: En. Sec. 18, Ch. 44, L. 1943.

69-519. Accounting for fees. The state board of health shall designate one (1) or more employees who shall, subject to the continuing supervision of the board, keep, in such detail and form as the board may prescribe, an account of all fees received, and remit such fees to the state treasurer in accordance with the laws of Montana. The board shall charge one (1) of such employees with primary responsibility for the receipt of, accounting for, and remittance of such fees, and the employees so designated with primary responsibility shall give a fidelity bond to the state of Montana, with corporate surety which bond and surety shall be approved by the board, in the penal sum of three thousand dollars (\$3,000.00) for the proper keeping, accounting and remittance of all such fees. Other designated employees may be required by the board to give to the state of Montana similar bonds in such lesser amounts as the board may deem proper and adequate.

History: En. Sec. 19, Ch. 44, L. 1943; amd. Sec. 10, Ch. 264, L. 1955.

69-520. Delayed or altered certificates. A person born in this state may file or amend a certificate after the time herein prescribed, upon submitting such proof as shall be required by the board or by any court.

History: En. Sec. 20, Ch. 44, L. 1943.

69-521. Delayed and altered certificates—procedure. (1) Certificates accepted subsequent to six (6) months after the time prescribed for filing, and certificates which have been altered after being filed with the state registrar, shall contain the date of the delayed filing and the date of the alteration and be marked "delayed" or "altered."

- (2) A summary statement of the evidence submitted in support of the acceptance for delayed filing or alteration shall be endorsed on the certificate or on the back of the same.
 - (3) Such evidence shall be kept in a special permanent file.

History: En. Sec. 21, Ch. 44, L. 1943.

69-522. Court procedure to establish date and place of birth and parentage. (1) Any person born in this state may petition any court of record of the county in which he resides or was born for an order establishing a public record of the time and place of his birth and his parentage. The petition shall be verified by him and shall allege the facts which he claims entitle him to such an order. The court shall fix the time and place of

hearing the petition.

- (2) If the court is satisfied from the evidence received at the hearing of the truth of the allegations of the petition and of the facts as to the time and place of the petitioner's birth and of his parentage, and that he resides in the county or was born there, the court shall make and enter an order reciting the jurisdictional facts and determining the time and place of the petitioner's birth and the names of his parents, and any other facts deemed relevant by the court.
- (3) The order or a certified copy thereof may be recorded in the office of the county clerk of the county and in the office of the state bureau of vital statistics.
- (4) The order, the record thereof, and certified copies of the order or of the records shall be evidence of the truth of their contents and be admissible as proof thereof at all times and places the same as certificates of birth mentioned in section 69-516. From the records thus received from the court the state bureau of vital statistics shall make a transcript of the important facts and make a delayed birth certificate on a form prescribed by the board. A certified copy of this delayed birth certificate shall constitute prima-facie proof of the facts recited in it.

History: En. Sec. 21A, Ch. 44, L. 1943.

Cross-Reference

Application of Montana Rules of Civil Procedure to this section, sec. 93-2711-7.

69-523. Delayed or altered certificates as evidence. The probative value of a "delayed" or "altered" certificate shall be determined by the judicial or administrative body or official before whom the certificate is offered as evidence.

History: En. Sec. 22, Ch. 44, L. 1943.

- 69-524. Disclosure of records. (1) The records and files of the bureau of vital statistics are open to inspection, subject to the provisions of this act and regulations of the board; but it is unlawful for any officer or employee of the state to disclose data contained in vital statistics records, except as authorized by this act and by the board.
- (2) Disclosure of illegitimacy of birth or of information from which it can be ascertained, may be made only upon order of a court in a case where such information is necessary for the determination of personal or property rights and then only for such purpose.

- (3) The state registrar shall not permit inspection of the records or issue a certified copy of a certificate or part thereof unless he is satisfied that the applicant therefor has a direct and tangible interest in the matter recorded and that the information therein contained is necessary for the determination of personal or property rights. His decision shall be subject, however, to review by the board or a court under the limitations of this section.
- (4) The board may permit the use of data contained in vital statistics records for research purposes, but no identifying use thereof shall be made.
- (5) Subject to the provisions of this section the board may direct the state registrar to make a return upon the filing with him of birth, death and stillbirth certificates and of certain data shown thereon to federal, state or municipal agencies.

History: En. Sec. 23, Ch. 44, L. 1943.

Adoption, duties of clerk of court—substitute birth certificate. In case of adoption of a person born in the state of Montana, it shall be the duty of the clerk of the district court to forward by the fifteenth of the following month a certified copy of the final order of adoption to the registrar of vital statistics of the state board of health. The state registrar upon receipt of the certified copy of the order of adoption shall prepare a substitute certificate in the new name of the adopted person, naming the true date and place of birth and sex of said adopted person and statistical particulars of the foster parents in place of the natural parents. The state registrar shall strike out the words "Attendant's own signature" on the substitute record and insert in their stead the words "State registrar" and sign as such, and all dates of recording are to be left as on the original. And the state registrar shall make such a substitute birth certificate if furnished with a certified copy of adoption for any birth certificate now in his custody. The state registrar shall send copies of the substitute record to the local registrar and to the county clerk and recorder, to be substituted for the copies of the original record in their possession. The local registrar and the county clerk and recorder shall forthwith enter the substitute record in their files and shall forward immediately to the state registrar the copies of the original birth record to be sealed with the original record in the files of the state registrar. Such sealed documents may be opened by the state registrar only upon the demand of the adopted person if of legal age, or by order of a court of competent jurisdiction. Upon receipt of a certified copy of a court order of annulment of adoption, the state registrar shall restore the original certificate to its original place in the files. In case of adoption of a person born in the United States of America but without the state of Montana, and adopted in the state of Montana, it shall be the duty of the clerk of the district court, upon request of an adopting parent and presentation to him of a certified copy of such person's birth certificate, to forward the certified copy of the birth certificate and a certified copy of the final order of adoption to the registrar of vital statistics of the state board of health. The state registrar, upon receipt thereof, shall prepare a birth certificate in the new name of the adopted person, naming the true date of birth and sex of said adopted person and statistical particulars of the foster parents in place of the natural parents. Upon receipt of a certified copy of a court order of annulment of adoption, the state registrar shall append it to the certified copy of the order of adoption and thereafter shall not issue any birth certificate.

History: En. Sec. 24, Ch. 44, L. 1943; amd. Sec. 1, Ch. 21, L. 1947.

69-526. Legitimation. In cases of legitimation the state registrar upon receipt of proof thereof shall prepare a new certificate of birth in the new name of the legitimated child. The evidence upon which the new certificate is made and the original certificate shall be sealed and filed and may be opened only upon order of court. In substituting records in case of legitimation the same procedure shall be followed as provided in the section on adoptions.

History: En. Sec. 25, Ch. 44, L. 1943.

69-527. Persons required to make records. Persons in charge of institutions for care or correction or for treatment of disease, injury or childbirth shall record and report all statistical data required by this act relating to their inmates or patients.

History: En. Sec. 26, Ch. 44, L. 1943.

69-528. Permit for removal, burial or other disposition. When a death or stillbirth occurs or a dead body is found the body shall not be disposed of or removed from the registration district until a permit has been issued by the local registrar.

History: En. Sec. 27, Ch. 44, L. 1943.

69-529. Foreign permit for removal, burial or other disposition of body. When death or stillbirth occurs outside this state and the body is accompanied by a permit for burial, removal or other disposition issued in accordance with the law and regulations in force where the death or stillbirth occurred, the permit shall authorize the transportation of the body into or through this state but before the burial, cremation or other disposal of the body within this state the permit shall be endorsed by the local registrar who shall keep a record thereof.

History: En. Sec. 28, Ch. 44, L. 1943.

69-530. Prerequisites for permit. No permit under section 69-528 shall issue until a certificate of death or stillbirth, as far as it can be completed under the circumstances of the case, has been filed and until all the regulations of the board in respect to the issuance of such permit have been complied with.

History: En. Sec. 29, Ch. 44, L. 1943.

69-531. Transmittal of certificates to state registrar. Local registrars shall transmit all original certificates filed with them to the state registrar in accordance with regulations of the board, after having made duplicate copies of such certificates to be filed with the county clerk and recorder.

History: En. Sec. 30, Ch. 44, L. 1943.

69-532. Compensation of local registrars. Each local registrar shall be paid the sum of twenty-five cents (25c) for each complete birth, death or stillbirth certificate returned by him to the state registrar in accordance with the regulations of the board. In case no birth, death or stillbirth was registered during any calendar month, the local registrar shall so report and be paid the sum of twenty-five cents (25c) for the report. The board is authorized to change by regulation the amounts specified herein to be paid to local registrars and the board shall limit the aggregate amount of fees to be paid per annum to any local registrar either by setting an annual aggregate maximum of such fees or by graduating the fees according to the number of registrations.

History: En. Sec. 31, Ch. 44, L. 1943.

69-533. Payment of fees. Upon certification by the state registrar the fees of local registrars shall be paid by the treasurer of the proper county, out of the general fund of the county. The state registrar annually shall certify to the treasurer of the several counties the number of births, stillbirths and deaths certified from his county with the names of the local registrars and the amount due each.

History: En. Sec. 32, Ch. 44, L. 1943.

69-534. Registration of marriage—marriage certificates filed. Every clerk of district court who issues a marriage license shall forward to the state registrar on or before the fifteenth of each calendar month certification of certain information contained on marriage licenses on forms prescribed by the state registrar from each certificate of marriage which was filed with him during the preceding calendar month.

History: En. Sec. 33, Ch. 44, L. 1943.

69-535. Marriage license fees. Every officer authorized to issue marriage licenses shall be paid a recording fee of twenty-five cents (25c) for each marriage certificate filed with him and forwarded by him to the state registrar. The recording fee shall be paid by the applicant for the license and be collected together with the fee for the license.

History: En. Sec. 34, Ch. 44, L. 1943.

69-536. Registration of divorces, annulments and adoptions. For each divorce, annulment of marriage, adoption or annulment of adoption, the clerk of the court shall prepare within thirty (30) days after the decree becomes final, certificate of such decree on a form prescribed by the state registrar; and before the fifteenth day of each calendar month the clerk shall forward to the state registrar the certificates prepared by him during the preceding calendar month.

History: En. Sec. 35, Ch. 44, L. 1943.

69-537. Penalties. (1) Any person who willfully makes or alters any certificate or certified copy thereof provided for in this act, except in accordance with the provisions of this act, shall be fined not more than one thousand dollars (\$1000.00), or be imprisoned not exceeding six (6) months, or both fined and imprisoned.

- (2) Any person who knowingly transports or accepts for transportation, interment or other disposition a dead body without an accompanying permit issued in accordance with the provisions of this act, shall be fined not more than five hundred dollars (\$500.00).
- (3) Except where a different penalty is provided in this section, any person who violates any of the provisions of this act or neglects or refuses to perform any of the duties imposed upon him by this act, shall be fined not more than one hundred dollars (\$100.00).

History: En. Sec. 36, Ch. 44, L. 1943.

69-538. Uniformity of interpretation. This act shall be so construed as to effectuate its general purpose.

History: En. Sec. 38, Ch. 44, L. 1943.

69-539. Short title. This act may be cited as the "Uniform Vital Statistics Act."

History: En. Sec. 39, Ch. 44, L. 1943.

CHAPTER 6

LOCAL BOARDS OF HEALTH IN CITIES AND TOWNS—CREATION
—POWERS AND DUTIES

Section 69-601. Local boards of health.

69-602. Salaries of local health officers.

69-603. Meetings of local boards of health-record.

69-604. Duties of local health officer.

69-605. Penalties for failure to comply with orders of board.

69-606. Powers of local boards of health. 69-607. Expenses of local and county boards.

69-608. Police officer must assist health officer when requested.

69-609. Interference with health officer-penalty.

69-601. (2464) Local boards of health. Each incorporated city or town in the state shall have a local board of health, the same being designated in this act as the "local board." Said local board shall consist of three members, to be appointed by the municipal authorities of the town or city and removable at their pleasure, one of whom shall be a physician, legally qualified to practice medicine and surgery in the state; the board shall elect one of its members as secretary; provided, that any incorporated town of less than five thousand inhabitants may, by written notice to the state board of health, and to the county board of health of the county in which said town is located, place itself under the care of the county board of health, in which case the county health officer, as hereinafter provided for, shall have the same authority within the corporate limits of such town as he has in the county outside of corporate limits; provided, that such incorporated town shall pay all expenses incurred in enforcing sanitary measures and quarantines within its corporate limits. If the municipal authorities of any incorporated city or town shall fail to appoint a board of health as required above, within thirty days after having been notified of such requirement by the secretary of the state board of health, then the state board of health may appoint a health officer for such town or city, and the health officer thus appointed by the state board of health

shall have all the powers, receive all the emoluments, and perform all the duties required of a local health officer appointed by the municipal authorities.

History: En. Sec. 11, Ch. 110, L. 1907; Sec. 1484, Rev. C. 1907; re-en. Sec. 2464, R. C. M. 1921. Cal. Pol. C. Secs. 3059-3064.

References

Griffith v. City of Butte, 72 M 552, 562, 234 P 829; Campbell v. City of Helena, 92 M 366, 379, 16 P 2d 1.

Collateral References

Health € 2 et seq.; Municipal Corporations € 191.

62 C.J.S. Municipal Corporations §§ 131, 699.

25 Am. Jur. 288, 291, Health, §§ 4, 5, 9 et seq.

Power of health commissioners to employ counsel. 2 ALR 1212.

General delegation of power to guard against spread of contagious disease. 8 ALR 836.

Personal liability of health officer. 24 ALR 798.

Validity, construction, and application of statutes, ordinances, and other regulations relating to transportation or disposal of carcasses of dead animals not slaughtered for food. 121 ALR 732.

69-602. (2465) Salaries of local health officers. The salary of each local health officer shall be determined by the municipal authorities of the respective city or town; provided, that such salaries shall not exceed, in counties of the first, second, and third classes, two thousand dollars per annum, and in counties of the fourth and fifth classes, twelve hundred dollars per annum, and in counties of the sixth, seventh, and eighth classes, not to exceed six hundred dollars per annum; and provided, further, that in all cases the state board of health shall have supervisory control over the action of all local county, city, or district health officers, who shall in all respects be subject to the direction of the state board.

History: En. Sec. 12, Ch. 110, L. 1907; Sec. 1485, Rev. C. 1907; re-en. Sec. 2465, R. C. M. 1921.

Collateral References

Health ← 7(2); Municipal Corporations ← 191.

39 C.J.S. Health §§ 8, 49; 62 C.J.S. Municipal Corporations §§ 131, 699.

69-603. (2466) Meetings of local boards of health—record. Each local board of health shall hold regular quarterly meetings, and such other meetings as may be deemed expedient. The secretary shall keep accurate records, in a book provided therefor, of the proceedings of such meetings. He shall keep accurate records of all communicable diseases reported to him, and for this purpose each local board of health shall provide, at the expense of the city or town, a book printed in proper blank form for the notation of such facts and data as may be prescribed by the regulations of the state board of health. These records shall be the property of the city or town, and must be turned over by the secretary to his successor in office.

History: En. Sec. 13, Ch. 110, L. 1907; Sec. 1486, Rev. C. 1907; re-en. Sec. 2466, R. C. M. 1921.

69-604. (2467) Duties of local health officer. The local health officer shall make sanitary inspection whenever and wherever he has reason to suspect that anything exists that may be detrimental to the public health. He shall, as secretary of the local board of health, by a written instrument under his hand, order the destruction, prevention, and removal, within a

specified time, of all nuisances, sources of filth, or causes of sickness, as directed by the local board of health, or order all public buildings, such as schoolhouses, churches, theaters, or other places where people congregate in considerable numbers, to be closed in time of epidemic or in the face of serious or unusual sickness, whenever, in his judgment and upon approval in writing by the secretary of the state board of health, safety may require the same, and may forbid and prevent the assembling of the people in any place when the public health and safety demand the same.

History: En. Sec. 14, Ch. 110, L. 1907; Sec. 1487, Rev. C. 1907; re-en. Sec. 2467, R. C. M. 1921.

Abatement of Nuisances

The county health officer has no power to take steps for the abatement of nuisances or the removal of sources of filth and incur expense in connection therewith, without first having received authorization from the county health board. Pue v. County of Lewis and Clark, 75 M 207, 210, 243 P 573.

Deputy Health Officer

This section making provision for a local health officer, does not provide for a deputy health officer. Pue v. County of Lewis and Clark, 75 M 207, 210, 243 P 573.

References

Campbell v. City of Helena, 92 M 366, 379, 16 P 2d 1.

Collateral References

Health ₹ 7(3), 20 et seq. 39 C.J.S. Health §§ 2, 9, 14 et seq. 25 Am. Jur. 293, Health, §§ 11 et seq.

69-605. (2468) Penalties for failure to comply with orders of board. If any person or corporation shall neglect or refuse to comply with any written order of a local, county, or state health officer, made and promulgated by either of them under this act, within a reasonable time, to be designated in the notice, such person or corporation shall be guilty of a misdemeanor. In case of such neglect or refusal to comply with such order, the local, county, or state board of health may cause it to be complied with at the expense of the town, city, or county, and such expenses shall be recovered from the person or corporation whose legal duty it was to comply with such order, by a civil action brought in the name of such town, city, or county.

History: En. Sec. 15, Ch. 110, L. 1907; Sec. 1488, Rev. C. 1907; re-en. Sec. 2468, R. C. M. 1921.

References

Pue v. County of Lewis and Clark, 75 M 207, 210, 243 P 573; Campbell v. City of Helena, 92 M 366, 379, 16 P 2d 1.

69-606. (2469) Powers of local boards of health. The local or county board of health shall have power to abate all nuisances affecting the public health; to destroy, prevent, and remove all sources of filth and causes of sickness or disease, and to guard against the introduction of communicable diseases by the exercise of proper and vigilant medical inspection and control of all persons and things in their respective districts, which, for any reason, are liable to communicate contagious diseases. They shall also have authority to establish and maintain, at the expense of their respective city, town, or county, isolation hospitals, where patients suffering from smallpox or other very dangerous, contagious, or infectious disease may be properly quarantined and cared for, when, in their judgment, they cannot be properly quarantined and cared for elsewhere. Towns, cities, and counties must establish and maintain such isolation hospitals when directed so to do by the state board of health, and for this purpose they may secure,

by purchase or otherwise, suitable building sites, and cities, towns, and counties may combine for the purpose of building, equipping, and maintaining such hospitals. The local or county boards of health shall also have power and authority to require the isolation of persons or things infected with or exposed to infectious or contagious diseases, provide suitable places for the reception thereof, and, if necessary, furnish medical treatment and care for such sick persons at the expense of the city, town, or county; to prohibit and prevent all intercourse or communication with, or use of infected premises, places, or things, and require and provide means for the thorough fumigation, purification, disinfection, and cleansing of the same before intercourse therewith or use thereof shall be allowed. When any contagious or infectious disease exists or is believed to exist on any premises within his jurisdiction, the local or county health officer shall immediately place such premises under quarantine, in accordance with the rules and regulations of the state board of health, and shall maintain such quarantine in accordance with such rules and regulations. At the expiration of the period of quarantine, the local or county health officer shall personally supervise the disinfection, fumigation, and cleansing of all persons or things which have been exposed to the contagion, and all disinfecting, fumigating, and cleansing shall be done in accordance with the rules and regulations of the state board of health, and at the expense of the city, town, or county.

History: En. Sec. 16, Ch. 110, L. 1907; Sec. 1489, Rev. C. 1907; re-en. Sec. 2469, R. C. M. 1921. Collateral References

Health \$\sim 6, 20 et seq. 39 C.J.S. Health \$\sim 2, 9, 10, 14.

References

Griffith v. City of Butte, 72 M 552, 562, 234 P 829; Campbell v. City of Helena, 92 M 366, 379, 16 P 2d 1.

69-607. (2470) Expenses of local and county boards. All necessary expenses incurred by any local board of health, and the salary of each local health officer, shall be paid from the treasury of the respective city or town, on presentation of an itemized and verified account; and all expenses incurred by a county board of health in the enforcement of the provisions of this act, shall be paid from the general fund of the respective counties, on presentation of an itemized and verified account. The city or town shall be liable for all expenses incurred with reference to residents of such city or town, except paupers, and the county shall be liable for all expenses incurred with reference to persons who are not residents of such city or town; provided, that persons who are merely sojourning in such city or town, or delayed by the authorities, or transients therein, or temporarily stopping therein without employment, shall not be deemed residents of such city or town. The county shall be liable for all expenses necessarily incurred by any local board of health with respect to any person not a resident of the city or town, and the city shall be liable for all expenses necessarily incurred by any county board of health with reference to any person, except paupers, who is a resident of such city or town. No county, city, or town shall escape any such liability for such expenses by transporting any person infected with, or known to have been exposed

to, any communicable disease to any other county, city, or town, or by persuading or inducing such person to go to such other city, town, or county.

History: En. Sec. 24, Ch. 110, L. 1907; Sec. 1497, Rev. C. 1907; amd. Sec. 1, Ch. 117, L. 1909; re-en. Sec. 2470, R. C. M. 1921.

Abatement of Nuisances

The county health officer has no power to take steps for the abatement of nuisances or the removal of sources of filth and incur expense in connection therewith, without first having received authorization from the county health board. Pue v. County of Lewis and Clark, 75 M 207, 210, 243 P 573.

References

Campbell v. City of Helena, 92 M 366, 379, 16 P 2d 1.

Collateral References

Health€=5.

39 C.J.S. Health § 8.

(2471) Police officer must assist health officer when requested. Any local, county, or state health officer may call upon all sheriffs, constables, or other public officers to assist them in the discharge of their duties, and if any such officer, so called upon, shall neglect or refuse to render such service, he shall be guilty of a misdemeanor, and subject to removal from office.

History: En. Sec. 17, Ch. 110, L. 1907; Sec. 1490, Rev. C. 1907; re-en. Sec. 2471, R. C. M. 1921.

Killing of Rabid Dog

Police officers were not liable to a dog owner for damages where the owner's dog was killed by the officers acting under an emergency quarantine measure which

was passed to meet a threatening situation involving rabies. Ruona v. City of Billings, 136 M 554, 323 P 2d 29, 31.

Collateral References

Officers 110 et seq.; Sheriffs and Constables 78 et seq.

67 C.J.S. Officers § 110; 80 Sheriffs and Constables § 35.

69-609. (2472) Interference with health officer—penalty. Any person who shall attempt to hinder, or who shall hinder the work of a local, county, or state health officer, or who shall remove, deface, or obscure any placard or notice posted under the authority or by the direction of such officer, or who shall violate any quarantine regulation, is guilty of a misdemeanor.

History: En. Sec. 18, Ch. 110, L. 1907; Sec. 1491, Rev. C. 1907; re-en. Sec. 2472, R. C. M. 1921.

CHAPTER 7

COUNTY BOARDS OF HEALTH AND COUNTY HEALTH OFFICERS-DUTIES

County boards of health. Section 69-701.

Appointment of county health officer. 69-702.

Duties of county boards of health-meetings. 69-703. Duties of local and county health officers.

69-704.

Failure of county or local health officer to perform duty-penalty. 69-705.

69-706. Duty of householder to notify board of health of presence of communicable disease.

69-707. Duty of physicians and other practitioners to report communicable

Duty of health officer to file complaint of violation of act. 69-708.

Compulsory vaccination of school children. 69-709.

69-710. Diseased prisoners.

69-711. Same.

69-712. Penalties for putting dead animals into streets, highways, etc.

69-701. (2473) County boards of health. There is hereby established in each county a board of health which is designated in this act as the "County Board of Health," which shall consist of the board of county commissioners and one physician legally authorized to practice medicine and surgery in this state, who must be appointed by the board of county commissioners. Said physician when so appointed shall be ex officio secretary of the county board of health and the county health officer, and shall hold office at the pleasure of the board. The county health officer shall have the same powers and perform the same duties in the county of his appointment, outside of the limits of incorporated towns or cities, as are hereinabove provided for a local health officer within the corporate limits of a town or city, and his salary shall be fixed by the board of county commissioners at an amount commensurate to the work devolving upon him, and when such county health officer, in the actual discharge of his official duties, is required to travel greater than two (2) miles from the county seat of the county he represents, he shall receive his actual traveling expenses. Said board may also, when in its judgment the interests of the county require, appoint a deputy county health officer who shall be located at a point where he can serve people residing in a portion of said county in a manner appropriate to their needs. The boards of county commissioners of two (2) or more adjacent counties may also, when in their opinion the needs of the people of the county will be better served by such an arrangement, make contractual agreements with one (1) or more existing boards of health for services for any part of the county adjacent to the jurisdictional area of such board of health. For these services, the board of county commissioners for the contractual area are authorized to provide funds from the general fund of such county. Whenever such contracts are made such boards of health are declared to be the board of health for the contractual area with all the powers and duties of such boards of health.

History: En. Sec. 19, Ch. 110, L. 1907; Sec. 1492, Rev. C. 1907; re-en. Sec. 2473, R. C. M. 1921; amd. Sec. 1, Ch. 111, L. 1957. For earlier acts see sections 163 to 167, 5th Division Compiled Statutes, 1887.

References

Pue v. County of Lewis and Clark, 75 M 207, 210, 243 P 573; Campbell v. City of Helena, 92 M 366, 379, 16 P 2d 1.

Collateral References

Health \$2 et seq. 39 C.J.S. Health \$4 et seq. 25 Am. Jur. 291, Health, \$8 9 et seq.

69-702. (2474) Appointment of county health officer. Should any board of county commissioners fail, neglect, or refuse to appoint a county health officer, as herein provided, for a period of thirty days after having been notified in writing by the secretary of the state board of health so to do, then, and in that event, the state board of health may appoint such health officer, and he shall have the same powers and perform the same duties, and receive the same emoluments as though appointed by the action of the board of county commissioners.

History: En. Sec. 20, Ch. 110, L. 1907; Sec. 1493, Rev. C. 1907; re-en. Sec. 2474, R. C. M. 1921.

Collateral References

Health ≈7(1). 39 C.J.S. Health § 7. 25 Am. Jur. 288, Health, §§ 5 et seq. 69-703. (2475) Duties of county boards of health—meetings. Each county board of health shall hold regular quarterly meetings, immediately after the adjournment of each regular quarterly meeting of the board of county commissioners, and at such other times as they may deem necessary, and may adopt all needful rules and regulations for the government of their respective bodies, subject to the provisions of this act; they shall establish such sanitary rules and regulations for their county for the prevention of the spread of disease as they may deem necessary; provided, that no such rules shall conflict with the rules and regulations of the state board of health, and any person who shall fail, neglect, or refuse to comply with such rules and regulations shall be guilty of a misdemeanor, and shall, on conviction, be fined not less than ten dollars and not more than fifty dollars for such offense.

History: En. Sec. 21, Ch. 110, L. 1907; Sec. 1494, Rev. C. 1907; re-en. Sec. 2475, R. C. M. 1921.

Collateral References Health \$\infty\$=6, 7\frac{1}{2}. 39 C.J.S. Health \$\cong 9, 10, 11.

69-704. (2476) Duties of local and county health officers. It shall be the duty of each local and county health officer, immediately upon his appointment, to transmit to the secretary of the state board of health his name, date of appointment, post-office address, together with the names and post-office addresses of the members of the board of health of which he is secretary. He shall at the end of each week transmit to the secretary of the state board of health, on blanks provided therefor, a complete report of all cases of communicable diseases reported to him or known by him to have occurred in his jurisdiction during that week, giving all the details regarding each case as is indicated by the blank forms provided by the state board of health.

He shall, on or before the first day of January, April, July, and October, prepare a report which shall set forth the general health and sanitary condition of his district, give a detailed account of all of his activities as health officer during the previous quarter, and such other information as the state board of health may call for. He shall present this report to the county or local board of health of which he is secretary at the regular quarterly meeting of the said board; and he shall, not later than the tenth day of the same month, send a copy of this report to the secretary of the state board of health, stating thereon the date of the regular quarterly meeting of the local or county board of health at which the report was presented.

Any local or county health officer who shall fail, neglect or refuse to make either the above-mentioned weekly or quarterly reports, within the time specified in this section, shall forfeit the sum of two dollars (\$2.00) for each day he is delinquent, which amount shall be deducted from his salary; and the secretary of the state board of health shall notify the chairman of the local or county board of health of the number of days its secretary is delinquent.

History: En. Sec. 22, Ch. 110, L. 1907; Sec. 1495, Rev. C. 1907; re-en. Sec. 2476, R. C. M. 1921; amd. Sec. 1, Ch. 93, L. 1931.

References

Pue v. County of Lewis and Clark, 75 M 207, 210, 243 P 573; Campbell v. City of Helena, 92 M 366, 379, 16 P 2d 1.

Collateral References
Health 27(3), 20 et seg.

Health 7(3), 20 et seq. 39 C.J.S. Health § 2, 9, 14 et seq.

25 Am. Jur., Health, p. 288, §§ 5 et seq.; p. 293, §§ 11 et seq.

69-705. (2477) Failure of county or local health officer to perform duty—penalty. Any local or county health officer who shall fail, neglect, or refuse to comply with any of the requirements of this act, or of the rules and regulations of the state board of health, shall be subject to a fine of not more than two hundred dollars.

History: En. Sec. 23, Ch. 110, L. 1907; Sec. 1496, Rev. C. 1907; re-en. Sec. 2477, R. C. M. 1921. Collateral References Health € 7(3). 39 C.J.S. Health § 9.

69-706. (2478) Duty of householder to notify board of health of presence of communicable disease. Whenever any householder knows or has reason to believe that any person within his family or household has any communicable disease, he shall immediately give notice thereof to the health officer of the town or city in which he resides, if within the corporate limits of a town or city, or to the county health officer if without the corporate limits of a town or city; and such notice shall be given at the office of the local or county health officer, within the shortest possible time and by the most direct means of communication.

History: En. Sec. 28, Ch. 110, L. 1907; Sec. 1501, Rev. C. 1907; re-en. Sec. 2478, R. C. M. 1921. Collateral References Health©⇒34. 39 C.J.S. Health §§ 19, 26.

69-707. (2479) Duty of physicians and other practitioners to report communicable diseases. Whenever any physician or other practitioner of the healing art examines or treats a person who has or is reasonably believed to have a communicable disease or any disease declared reportable by the state board of health, such physician or other practitioner shall immediately report the case to the county or local health officer having jurisdiction of the territory in which the said case is found. The report shall be in the form and manner prescribed by the state board of health.

History: En. Sec. 29, Ch. 110, L. 1907; Sec. 1502, Rev. C. 1907; re-en. Sec. 2479, R. C. M. 1921; amd. Sec. 1, Ch. 26, L. 1933.

69-708. (2480) Duty of health officer to file complaint of violation of act. It shall be the duty of each local or county health officer in the state, who shall have knowledge of any violation of this act, occurring within his district, to forthwith file a complaint with a justice or magistrate having jurisdiction.

History: En. Sec. 30, Ch. 110, L. 1907; Sec. 1503, Rev. C. 1907; re-en. Sec. 2480, R. C. M. 1921. Collateral References Health \$\infty\$ 40. 39 C.J.S. Health § 32.

69-709. (2481) Compulsory vaccination of school children. Whenever smallpox exists or is threatened in any part of the state, the state board of health shall have authority to require all persons frequenting any school-house within the infected or threatened district to be vaccinated, or to present evidence of a successful vaccination with cowpox, and no person

shall be permitted to enter any schoolhouse within the district included in the order of the state board of health unless such requirements are complied with.

History: En. Sec. 31, Ch. 110, L. 1907; Sec. 1504, Rev. C. 1907; re-en. Sec. 2481, R. C. M. 1921. 39 C.J.S. Health § 14. 25 Am. Jur. 312, Health, § 35.

Collateral References
Health 25

Vaccination of school children. 93 $\rm ALR$ 1413.

69-710. (2482) Diseased prisoners. Whenever any person in any jail shall be attacked with any disease which, in the opinion of the local or county health officer, shall be considered dangerous to the health of the other prisoners, the health officer may, by his order in writing, direct the removal of such person to some hospital or other place of safety, there to be provided for and securely kept so as to prevent his escape until his further orders, and if such prisoner shall recover from such disease he shall be returned to such jail.

History: En. Sec. 33, Ch. 110, L. 1907; Sec. 1506, Rev. C. 1907; re-en. Sec. 2482, R. C. M. 1921. Collateral References Criminal Law©=1218. 24B C.J.S. Criminal Law §§ 1976, 2000.

69-711. (2483) Same. If any person removed from any jail by any health officer shall have been committed by order of any court or under any judicial process, the order for his removal, or a copy thereof, attested by the health officer issuing such order, shall be returned to him, with the proceedings endorsed thereon, to the office of the clerk of the district court of the county, and no prisoner removed as aforesaid shall be considered as thereby having committed an escape.

History: En. Sec. 34, Ch. 110, L. 1907; Sec. 1507, Rev. C. 1907; re-en. Sec. 2483, R. C. M. 1921.

69-712. (2484) Penalties for putting dead animals into streets, highways, etc. If any person or persons shall put any dead animal, or part of the carcass of any dead animal, into any lake, river, creek, pond, reservoir, road, street, alley, lot, field, or meadow or common, or in any place within one mile of the residence of any person or persons, except the same and every part thereof be burned, or buried at least two feet under ground, or who, being the owner, shall knowingly permit the same to remain in any of the aforesaid places to the injury of the health, or to the annoyance of the citizens of this state, or any of them, every person so offending shall be guilty of a misdemeanor, and every twenty-four hours that said person shall permit the same to remain shall be deemed an additional offense under the provisions of this act.

History: En. Sec. 35, Ch. 110, L. 1907; Sec. 1508, Rev. C. 1907; re-en. Sec. 2484, R. C. M. 1921.

Collateral References

2 Am. Jur. 803, Animals, §§ 153 et seq.

Validity of statutes for the control of diseases of livestock. 65 ALR 525.

Validity, construction, and application of statutes relating to transportation or disposal of carcasses of dead animals not slaughtered for food. 121 ALR 732.

CHAPTER 8

ESTABLISHMENT OF FULL-TIME COUNTY AND DISTRICT HEALTH DEPARTMENTS AND BOARDS OF HEALTH AUTHORIZED

Section 69-801. State board of health authorized to receive grants from United States and other agencies for maintaining health units.

69-802. Establishment of full-time county health units.

69-803. Merger of city and county health service units, cities of first class.

69-804. Creation of county boards of health. 69-805. Establishment of district health units. 69-806. Creating district boards of health.

69-807. Full-time county and district health officers, personnel, qualifications, how employed.

Minimum personnel.

69-809. Unconstitutional.

69-810. Indigent sick.

69-811. Participation by official and nonofficial agencies in maintenance of full-time county or district health units.

69-812. Finances. 69-813. Penalty. 69-814. Repeal.

69-808.

69-801. State board of health authorized to receive grants from United States and other agencies for maintaining health units. The state board of health of Montana is hereby authorized and empowered to receive from the United States, or agencies thereof, and from other agencies within and without the state such grants or sums of money as may hereafter be allocated from the United States or agencies thereof, and from other agencies, to the state board of health of Montana for the promotion and development of public health work within the state; and to use certain portions of such moneys so received as grants-in-aid to counties or districts in maintaining full-time county or district health units, the organization of which is herein provided for; and to participate in the creation and supervision thereof as hereinafter provided.

History: En. Sec. 1, Ch. 171, L. 1945.

Political Subdivisions

subdivision of the state. Bacus v. Lake County, — M —, 354 P 2d 1056, 1058.

A county or district board of health cannot be classified or termed a political

69-802. Establishment of full-time county health units. Any county may at the discretion of the county commissioners establish a full-time county health unit and provide for the maintenance of the same under the provisions of this act. A full-time county health unit shall be considered to be a health organization which shall be under the immediate direction of a health officer and other trained personnel who shall be employed by the county board of health with the approval of the state board of health, to devote their entire time to the prevention of disease and the promotion of the public health.

History: En. Sec. 2, Ch. 171, L. 1945.

69-803. Merger of city and county health service units, cities of first class. Any first-class city located within a county in which a county health unit is now being maintained or may be organized, by mutual agreement between the municipal government and the county government, may merge

its health service with that of the county in which it is located and participate in the financial maintenance of the full-time county health unit which shall have full supervision and control over all matters pertaining to the prevention of disease and the promotion of the public health within such city. All matters pertaining to the prevention of disease and the promotion of health in cities, towns and villages, other than first-class cities, which are located in a county maintaining a county health unit, shall come under the jurisdiction of the full-time county health unit.

History: En. Sec. 3, Ch. 171, L. 1945.

69-804. Creation of county boards of health. There shall be created in each county operating a full-time county health unit a county board of health to consist of five (5) members, all of whom shall be qualified electors of the state of Montana and of the county in which they serve. The members of the board shall consist of a county commissioner selected by the board of county commissioners, and four (4) other members, one of whom shall be a doctor of medicine and one of whom shall be a doctor of dentistry, each of whom must be appointed by the board of county commissioners and approved by the state board of health, provided that such members shall not hold any other county office, and further provided that in those counties where first-class cities combine with the county in the maintenance of a county health unit, the board of health shall include as one of the members the city superintendent of schools, and the mayor or one member of the city council to be appointed by the mayor of such participating first-class city. The county health officer shall not be a member of the board of health but shall act as its secretary. Where a board of health consists of five (5) members, one member shall be appointed for one (1) year, one (1) member shall be appointed for two (2) years, one (1) member shall be appointed for three (3) years, one (1) member shall be appointed for four (4) years, and one (1) member shall be appointed for five (5) years, etc., and upon the termination of office, members shall be thereafter appointed for a period of five (5) years. Vacancies which occur on the board of health by reason of death or resignation or for other reasons, shall be filled for the unexpired term of the vacated member and appointments to fill such vacancies shall be made as heretofore specified, and the member or members so appointed shall be approved by the state board of health.

History: En. Sec. 4, Ch. 171, L. 1945.

69-805. Establishment of district health units. Two or more adjacent counties and the first-class cities located therein may, when it is so desired by the several political subdivisions, pool their resources to form a full-time district health unit. For the maintenance of such full-time district health unit the cost thereof shall be borne by the several participating counties on a basis of assessed valuation of each participating county in proportion to the total assessed valuation of all property within the area included in the district. When first-class cities desire to co-operate in the maintenance of a full-time district health unit, they shall financially co-operate in such amount as may be agreed upon by the governing council or body of the city concerned and the county commissioners for the county

in which such first-class city is located. Any funds appropriated for health service by a city which shall participate in the maintenance of a full-time district health unit shall be paid to the county treasurer who shall disburse those funds as county funds.

A full-time district health unit shall be construed to be a health unit organized to include contiguous territory in one or more adjacent counties; and which shall be under the immediate direction of a health officer and other personnel who shall be employed to devote their entire time to the prevention of disease and the promotion of the public health; provided that it shall be permissible to employ at least one (1) physician on a part-time basis as assistant health officer in each county included in the health district other than the county in which the headquarters of the district health unit are located. The duties of an assistant health officer shall be confined to the diagnosis of communicable disease and such other duties as may be assigned to him by the district health officer.

History: En. Sec. 5, Ch. 171, L. 1945.

of the state which have entered into cooperative measure. Bacus v. Lake County, — M —, 354 P 2d 1056, 1058.

Political Subdivisions

Under this section the counties themselves are still the political subdivisions

Creating district boards of health. When two or more counties unite in the maintenance of a district health unit, a district board of health shall be created in the following manner: The district board of health shall consist of a member of the county commissioners of each participating county who shall be appointed by the board of county commissioners of each participating county, and additional members not to exceed a total of seven (7) members. In the event one or more first-class cities shall co-operate in the maintenance of a full-time district health unit, the mayor, with the approval of the city council or other governing body of each first-class city so co-operating in the maintenance of a district health unit shall appoint one (1) member to the district board of health. Other members of the district board of health, not to exceed a total of seven (7) members in all, one of whom shall be a superintendent of schools, a doctor of dentistry, and another a doctor of medicine, each of whom shall be appointed upon mutual agreement by the governing bodies of the political subdivisions concerned, and, in the case of disagreement, by the state board of health. Members of a district board of health shall be appointed to hold office for a term of one (1), two (2), three (3), four (4), five (5), six (6) and seven (7) years respectively, after which the appointments shall be made for a term of seven (7) years. Vacancies occurring in the district board of health as a result of death, resignation, the termination of office, or for other reasons, shall be filled by appointing body or bodies, as outlined herein above, for the remainder of the term so vacated.

The district board of health shall designate the location and provide the office for the district health department and furnish it with the necessary equipment.

Meetings of the district board of health shall be held quarterly at such place as is designated by the board or upon call by the district health officer or the secretary of the state board of health. Members of the district board

of health shall serve without compensation but shall be entitled to payment for travel and other necessary expenses incurred while attending meetings of the board of health; provided that in no instance shall travel expenses be paid in excess of five (5c) cents per mile nor subsistence be paid in excess of five (\$5.00) dollars per diem.

History: En. Sec. 6, Ch. 171, L. 1945.

69-807. Full-time county and district health officers, personnel, qualifications, how employed. Full-time county and district boards of health shall, with the approval of the state board of health, employ a full-time county or district health officer, whose term of office shall be four (4) years, and such other personnel as are needed to efficiently carry on the work of the department. All such personnel employed shall be subject to the rules and regulations of the joint Montana merit system council and shall meet such qualifications as are specified under their respective classifications.

In the event health officers who are trained in the field of public health cannot be obtained in the state of Montana, the state board of health may recommend for appointment health officers who shall meet the above qualifications and who may be employed from without the state. Any health officer who shall be employed from without the state of Montana shall be a graduate of an accredited medical school and shall be eligible for license to practice medicine within the state.

History: En. Sec. 7, Ch. 171, L. 1945.

69-808. Minimum personnel. The minimum personnel to be employed by a full-time county or district health unit shall consist of a health officer, a clerk, a sanitary inspector and at least one public health nurse for each county participating in the maintenance of a health unit.

History: En. Sec. 8, Ch. 171, L. 1945.

69-809. Unconstitutional.

Unconstitutional

This section (Sec. 9, Ch. 171, L. 1945), giving full-time county and district boards of health power to enact rules and regula-

tions, is unconstitutional as an invalid delegation of legislative power. Bacus v. Lake County, — M —, 354 P 2d 1056, 1061.

69-810. Indigent sick. In no instance shall a full-time county or district health officer be required to act as physician to the indigent in counties or cities under his jurisdiction. Upon recommendation of the county commissioners to the county or district boards of health he may be placed in supervisory charge of the communicable diseases hospitals and such clinics as may be maintained by the county or cities coming under his jurisdiction.

History: En. Sec. 10, Ch. 171, L. 1945.

69-811. Participation by official and nonofficial agencies in maintenance of full-time county or district health units. Municipalities, school boards and other official or nonofficial agencies shall be permitted to contribute funds toward the support and maintenance of full-time county or district health units but all public health activities carried out through the use of

funds so contributed shall be under the direction of the full-time county health officer.

History: En. Sec. 11, Ch. 171, L. 1945.

69-812. Finances. The county or district boards of health shall submit to the tax levying authorities an annual budget, at least two weeks prior to the dates specified by law for setting up official budgets. Funds for operation of full-time health departments shall be derived from the general fund of participating agencies, provided, however, if the general fund is insufficient to meet the approved budget, a levy, not to exceed one (1) mill, may be made on the assessed valuation in addition to all other taxes allowed by law to be levied on such property.

History: En. Sec. 12, Ch. 171, L. 1945.

69-813. Penalty. Violation of any of the provisions of this act or of the rules and regulations authorized or outlined herein shall constitute a misdemeanor, and any person adjudged guilty thereof in a court of competent jurisdiction shall be punished by a fine of not less than ten (\$10.00) dollars nor more than five hundred (\$500.00) dollars for each offense or imprisonment in the county jail not exceeding ninety (90) days.

History: En. Sec. 13, Ch. 171, L. 1945.

Constitutionality

This section is unconstitutional as an invalid delegation of power, in so far as it

applies to rules and regulations promulgated under section 69-809. Bacus v. Lake County, — M —, 354 P 2d 1056, 1061.

69-814. Repeal. Nothing in this act shall be construed as repealing any existing law, statute, rule or regulation relating to the protection of the public health not in conflict with or inconsistent with this act.

History: En. Sec. 14, Ch. 171, L. 1945.

CHAPTER 9

STATE EPIDEMIOLOGIST—EMPLOYMENT AND POWERS

Section 69-901. State epidemiologist-employment and powers.

69-902. Duties. 69-903. Repealed.

69-901. (2540) State epidemiologist—employment and powers. The state board of health of the state of Montana is hereby authorized and empowered to employ a regularly qualified physician and surgeon licensed to practice such professions in the state of Montana, and who, in addition to such qualifications shall be a technically trained and competent public health physician; such person may be described by the board as state epidemiologist or described and referred to as disease control officer or by such other title as the board may designate.

History: En. Sec. 1, Ch. 76, L. 1919; re-en. Sec. 2540, R. C. M. 1921; amd. Sec. 11, Ch. 264, L. 1955.

69-902. (2541) Duties. The duties of the state epidemiologist shall be to study the causes and prevalence of diseases in the state of Montana, to take the proper steps to check such diseases, and to assist the local and

county health officers in the suppression of these diseases, and perform such other duties as the state board of health may direct.

History: En. Sec. 2, Ch. 76, L. 1919; re-en. Sec. 2541, R. C. M. 1921.

Collateral References

General delegation of power to guard against spread of contagious disease. 8 ALR 836.

69-903. (2542) Repealed—Chapter 264, Laws of 1955.

Repeal

This section (Sec. 3, Ch. 76, L. 1919), relating to the qualifications, salary, and

traveling expenses of the state epidemiologist, was repealed by Sec. 28, Ch. 264, Laws 1955, effective March 10, 1955.

CHAPTER 10

STATE BOARD OF ENTOMOLOGY—DUTIES—INFANTILE PARALYSIS —ROCKY MOUNTAIN SPOTTED FEVER CONTROL

Section 69-1001. Creation and membership of board of entomology. 69-1002. Secretary of board. 69-1003. Compensation and expenses of members of board. 69-1004. Duties of board. Eradication of diseases transmitted by insects. 69-1005. 69-1006. Rules, regulations and quarantine. 69-1007. Regulations subject to approval of board of health. 69-1008. Publication and circulation of rules and regulations. 69-1009. Penalty for violation of rules and regulations. 69-1010. Extermination of tick-bearing rodents—definition of terms. Establishment of control districts. 69-1011. 69-1012. Regulations for the extermination of rodents. 69-1013. Appointment of agents for purposes of extermination-powers and duties of agents and members of board of entomology. 69-1014. Agents to be under supervision of board of entomology-notice to owner of animals in inclosed fields and to occupants of dwellingsrecords. 69-1015. Compensation of agents-maximum expense against land-duty of county treasurer—appeal to district court. Preparation, sale and approval of poison. 69-1016. 69-1017. Quarantine of control districts. 69-1018. Regulations concerning grazing outside of inclosures within control districts. 69-1019. Penalty for violation of act. Authority for county commissioners to appoint agents. 69-1020. 69-1021. Rocky Mountain spotted fever control fund-levy-use of fund. 69-1022. Report of agents-compensation. 69-1023. Commissioners may purchase materials. 69-1024. "Rodents" defined.

69-1001. (2543) Creation and membership of board of entomology. There is hereby created the Montana state board of entomology, which shall be composed of the state entomologist, the secretary of the state board of health, and the state veterinarian.

Repealing clause—supplemental nature of act.

History: En. Sec. 1, Ch. 120, L. 1913; re-en. Sec. 2543, R. C. M. 1921.

69-1025.

Collateral References

Health€=3.

39 C.J.S. Health §§ 4, 7.

69-1002. (2544) Secretary of board. The secretary of the state board of health shall be chairman of said board, and the state entomologist shall be secretary.

History: En. Sec. 2, Ch. 120, L. 1913; re-en. Sec. 2544, R. C. M. 1921.

69-1003. (2545) Compensation and expenses of members of board. None of the members of said board shall receive any compensation other than that already allowed by law, except that the actual expenses of members while engaged in the duties incident to the work of said board shall be paid out of the appropriation made to carry on the work of said board.

History: En. Sec. 3, Ch. 120, L. 1913; re-en. Sec. 2545, R. C. M. 1921.

Collateral References Health©=5. 39 C.J.S. Health § 8.

69-1004. (2546) **Duties of board.** It shall be the duty of said board to investigate and study the dissemination by insects of diseases among persons and animals, said investigation having for its purpose the eradication and prevention of such diseases.

History: En. Sec. 4, Ch. 120, L. 1913; re-en. Sec. 2546, R. C. M. 1921.

Collateral References Health ≈ 6, 20 et seq. 39 C.J.S. Health §§ 2, 9, 10, 14 et seq.

69-1005. (2547) Eradication of diseases transmitted by insects. Said board shall take steps to eradicate and prevent the spread of Rocky Mountain tick fever, infantile paralysis, and all other infectious or communicable diseases that may be transmitted or carried by insects.

History: En. Sec. 5, Ch. 120, L. 1913; re-en. Sec. 2547, R. C. M. 1921.

69-1006. (2548) Rules, regulations and quarantine. Said board shall have authority to make and prescribe rules and regulations, including the right of quarantine, over persons and animals in any district of infection, and shall have the right to designate and prescribe the treatment for domestic animals to prevent the spread of such diseases; but said board shall not have the right to prescribe or regulate the treatment given to any person suffering from any infectious or communicable disease.

History: En. Sec. 6, Ch. 120, L. 1913; re-en. Sec. 2548, R. C. M. 1921.

69-1007. (2549) Regulations subject to approval of board of health. All rules and regulations of the state board of entomology shall be subject to approval by the state board of health.

History: En. Sec. 7, Ch. 120, L. 1913; re-en. Sec. 2549, R. C. M. 1921.

69-1008. (2550) Publication and circulation of rules and regulations. The board shall publish in printed form all rules and regulations which shall be adopted by said board for the eradication and control of diseases of any kind, and such rules and regulations shall be circulated among the residents of every district affected thereby.

History: En. Sec. 8, Ch. 120, L. 1913; re-en. Sec. 2550, R. C. M. 1921.

Collateral References
Health \$\infty 22\$ et seq.
39 C.J.S. Health \$ 12 et seq.

69-1009. (2551) Penalty for violation of rules and regulations. Any person who shall violate any of the rules or regulations of the state board of

entomology shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not in excess of one hundred dollars, or by imprisonment in the county jail for any period not exceeding thirty days, or by both such fine and imprisonment.

History: En. Sec. 9, Ch. 120, L. 1913; re-en. Sec. 2551, R. C. M. 1921.

Collateral References Health©=37. 39 C.J.S. Health §§ 30, 31.

69-1010. (2552) Extermination of tick-bearing rodents—definition of terms. The word "owner" as used in this act shall be construed to include both the singular and plural, as the case may be, and shall include corporations, companies, societies and associations. When construing and enforcing the provisions of this act, the act, omission, or failure of any officer, agent, or other person, acting for or employed by any corporation, company, society, or association, within the scope of his employment of office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society, or association, as well as that of the other person. The words "control district" as used in this act shall mean only such control districts of the state board of entomology as have been or may be specifically established for the control or eradication of any tick transmitting Rocky Mountain spotted fever. The words "other rodents" as used in this act shall be construed to include all rodents, other than the Columbian ground squirrel, that are hosts of any stage of a tick transmitting Rocky Mountain spotted fever. The words "domestic animals" as used in this act shall be construed to include cows, horses, mules, asses, sheep, goats, and hogs.

History: En. Sec. 1, Ch. 27, L. 1919; re-en. Sec. 2552, R. C. M. 1921.

Collateral References Health €==23. 39 C.J.S. Health §§ 13, 16, 17, 20, 28.

69-1011. (2553) Establishment of control districts. The state board of entomology may, from time to time and whenever it deems it necessary so to do, create and establish control districts for the extermination of the Rocky Mountain spotted fever tick. Such control districts shall be created and established by a written order of the board, which shall particularly define the boundaries of such districts.

History: En. Sec. 2, Ch. 27, L. 1919; re-en. Sec. 2553, R. C. M. 1921.

69-1012. (2554) Regulations for the extermination of rodents. The state board of entomology is hereby empowered to make such regulations as it may deem necessary, requiring the owners of land in any control district to poison or otherwise kill and exterminate the Columbian ground squirrel or other rodents, and such regulations shall specify the Columbian ground squirrel or other rodents to be destroyed, as well as the number of times each year, the period or periods during which, the means by which, and the control district or districts in which such poisoning or otherwise killing and exterminating of the Columbian ground squirrel or other rodents shall be accomplished; and the secretary of said board shall cause all such regulations to be published in one or more of the newspapers circulated in

the county or counties concerned during two weeks immediately following their adoption by said board.

History: En. Sec. 3, Ch. 27, L. 1919; re-en. Sec. 2554, R. C. M. 1921.

69-1013, (2555) Appointment of agents for purposes of extermination powers and duties of agents and members of board of entomology. Upon the establishment of one or more control districts within any county in Montana, the county commissioners of such county are hereby authorized and empowered to appoint some suitable person or persons, whose duty it shall be to poison or otherwise kill and exterminate the Columbian ground squirrel or other rodents within the limits of such control districts, and said county commissioners are further authorized and empowered to pay out of the general fund of the county the per diem of the person or persons so appointed, and all other expenses in connection with the killing and extermination of such Columbian ground squirrel or other rodents. Any person so appointed is hereby empowered and directed to perform such poisoning or otherwise killing and exterminating of the Columbian ground squirrel or other rodents as the state board of entomology may specify, provided the owner shall refuse or neglect to do so when so directed in the regulations of the state board of entomology, or shall refuse or neglect to do so within the period specified by the regulations of said board, or provided such work has not been performed in a thorough and efficient manner. Any person so appointed is further empowered and directed to enter upon any farm, grounds, or premises, a railroad right of way, or any other parcel of land, for the purpose of determining whether or not the Columbian ground squirrel or other rodents are present, or for the purpose of killing and exterminating the Columbian ground squirrel or other rodents, or to determine whether or not the Columbian ground squirrel or other rodents have been poisoned or otherwise killed and exterminated, in accordance with the provisions of this act and the regulations of the state board of entomology.

It is further provided that each member of the state board of entomology, and each of its duly authorized representatives and employees, are similarly empowered to enter upon any farm, grounds, or premises, a railroad right of way, or any other parcel of land at any time, for each and all of the purposes specified in this act. When an owner has neglected or refused to poison, kill, or otherwise exterminate the Columbian ground squirrel or other rodents as required by the provisions of this act and the regulations of said board, or has not done so in a thorough and efficient manner, the secretary of the state board of entomology, or his duly authorized representative, shall notify such owner that such poisoning or otherwise killing and exterminating of the Columbian ground squirrel or other rodents will be performed at the owner's expense under the direction of said board, as provided in this act, and such notice shall be mailed to the last known address of such owner, and, in case of a railroad right of way, shall be delivered to the nearest station agent.

History: En. Sec. 4, Ch. 27, L. 1919; re-en. Sec. 2555, R. C. M. 1921.

69-1014. (2556) Agents to be under supervision of board of entomology -notice to owner of animals in inclosed fields and to occupants of dwellings—records. Any person or persons appointed for the purpose of poisoning or otherwise killing and exterminating the Columbian ground squirrel or other rodents, as provided for in the preceding section, shall perform such work under the direction of the state board of entomology or its duly authorized representative in the county concerned; and it shall be the duty of any such person, or of any duly authorized representative or employee of said board, to give the owner or person in charge of any domestic animals which are pastured on the fenced land on which he is empowered to lay out poison or kill and exterminate the Columbian ground squirrel or other rodents, at least forty-eight hours' notice in writing before laying out such poison, and to notify the owner or occupant of any dwelling or farmhouse, before laying out poison for the above purpose within twenty rods of such dwelling or farmhouse. He shall further keep such records of infestation by the Columbian ground squirrel or other rodents as may be directed by the state board of entomology or its duly authorized representative, and shall keep an accurate record of the work performed on each parcel of land on which such person has poisoned or otherwise killed and exterminated the Columbian ground squirrel or other rodents, specifying therein the kind of rodents so poisoned or otherwise killed and exterminated, the number of hours of labor required therefor, the date or dates during which, and a description of the land on which such labor was performed, together with the amount of poison or other material used, and shall transmit two sworn copies of such records to the secretary of the state board of entomology or his duly authorized representative in the county concerned, and the latter shall, on or before the first day of August of each year, transmit one copy thereof, on which is computed the total expense incurred on each parcel of land, to the county treasurer.

History: En. Sec. 5, Ch. 27, L. 1919; re-en. Sec. 2556, R. C. M. 1921.

69-1015. (2557) Compensation of agents—maximum expense against land—duty of county treasurer—appeal to district court. Any person or persons appointed for the purpose of poisoning or otherwise killing and exterminating the Columbian ground squirrel or other rodents, as provided for in section 69-1013, shall receive as compensation not to exceed the sum of three dollars and fifty cents per day of eight hours for labor performed in carrying out the provisions of this act, and such amount shall be paid by the county concerned out of its general fund. The maximum charge against any parcel of land shall not be greater for any one treatment than at the rate of eight dollars per one hundred and sixty acres. Whenever under the provisions of this act or of the regulations of the state board of entomology any money is expended by a county for the purpose of poisoning or otherwise killing and exterminating the Columbian ground squirrel or other rodents from any parcel of land, the county treasurer of such county shall notify the owner of such land in writing of the amount so expended. Said notice shall be mailed to the last known address of such owner, and if such owner shall fail to pay the amount so expended by the county within thirty days of the time such notice is sent, then, and in that event, the county treasurer shall add the amount so expended to the taxes upon said property, and shall collect the same as provided by law for the collection of taxes for state and county purposes, except that such owner may, within thirty days from the time such notice is sent, appear before the county commissioners and show cause why such sum should not be paid; provided, however, that if such owner shall feel aggrieved by the decision of the county commissioners, such owner may appeal to the district court, and such appeal shall be perfected and prosecuted in the same manner as appeal in justice courts.

History: En. Sec. 6, Ch. 27, L. 1919; re-en. Sec. 2557, R. C. M. 1921.

Collateral References
Health ≈ 7(2), 23.
39 C.J.S. Health §§ 8, 13, 16, 17, 20, 28,
49.

69-1016. (2558) Preparation, sale and approval of poison. In any county concerned, poison for the killing and exterminating of the Columbian ground squirrel or other rodents shall be prepared by the secretary of the state board of entomology or his duly authorized representative, and shall be sold by him or his agents at cost to any owner or occupant of land in any control district; and it is further provided that the secretary of the state board of entomology or his duly authorized representative shall also prepare or approve all poison used by persons authorized under this act to lay out poison on lands, the owners of which shall refuse or neglect to poison or otherwise kill and exterminate the Columbian ground squirrel or other rodents as directed by the regulations of the state board of entomology.

History: En. Sec. 7, Ch. 27, L. 1919; re-en. Sec. 2558, R. C. M. 1921.

Collateral References

Health 23; Poisons 2.

39 C.J.S. Health §§ 13, 16, 17, 20, 28; 72
C.J.S. Poisons § 4.

69-1017. (2559) Quarantine of control districts. Between March 1st and July 15th of each year, each control district shall be held to be a quarantined area. Owners of domestic animals shall be prohibited from taking or moving such animals into or out of any quarantined control district, or from allowing such domestic animals to wander into or out of any quarantined control district; provided, that such domestic animals may be moved into or out of such quarantined control district under permits issued by the secretary of the state board of entomology or by his duly authorized representative, except that no permit so issued shall be effective for animals upon which a quarantine has been placed by the livestock sanitary board; and provided, further, that animals ridden under the saddle or driven in harness or under yoke shall not be subject to this quarantine.

The secretary of the state board of entomology or his duly authorized representative shall be required to satisfy himself that domestic animals are free of ticks before issuing to the owner a permit allowing the removal into or out of quarantined district of such domestic animals.

History: En. Sec. 8, Ch. 27, L. 1919; re-en. Sec. 2559, R. C. M. 1921.

Collateral References Health © 24. 39 C.J.S. Health §§ 15, 17. 69-1018. (2560) Regulations concerning grazing outside of inclosures within control districts. The state board of entomology is hereby authorized and empowered to make regulations for the purpose of prohibiting or of regulating and controlling the grazing of domestic animals on unfenced land and roadsides and country roads within the limits of any control district established by said board.

History: En. Sec. 9, Ch. 27, L. 1919; re-en. Sec. 2560, R. C. M. 1921.

Collateral References Health \$\infty\$=20. 39 C.J.S. Health \$\xi\$ 2, 14.

69-1019. (2561) Penalty for violation of act. Any owner of domestic animals who shall violate any provision of the two preceding sections, or any regulation of the state board of entomology made in conformity therewith, shall be guilty of a misdemeanor, and shall be fined in any sum not greater than one hundred dollars or imprisoned in the county jail for any period not exceeding thirty days, or both such fine and imprisonment may be imposed.

History: En. Sec. 10, Ch. 27, L. 1919; re-en. Sec. 2561, R. C. M. 1921.

Collateral References Health \$\sim 37\$. 39 C.J.S. Health \$\\$ 30, 31.

69-1020. (2561.1) Authority for county commissioners to appoint agents. The board of county commissioners of any county of this state, when there are within the limits of such county any lawfully established control districts of the state board of entomology for the control of Rocky Mountain spotted fever are hereby authorized and empowered, upon the request of said state board of entomology or its duly authorized representative in such county, to appoint any suitable person or persons, whose duty it shall be to shoot, poison, trap or to otherwise catch or kill rodents within the limits of such control districts, and any person so appointed is hereby empowered and directed to enter upon any farm, railroad right of way, grounds or premises infested with rodents and located within the limits of such control districts, and to shoot, poison, trap or to otherwise catch or kill such rodents. It is further provided that any person so appointed shall work under the direction of the state board of entomology or its duly authorized representative in any county concerned.

History: En. Sec. 1, Ch. 24, L. 1923.

69-1021. (2561.2) **Rocky Mountain spotted fever control fund—levy—use of fund.** The board of county commissioners in any county in which there are any such control districts may create a "Rocky Mountain spotted fever control fund," either by appropriating money from the general fund of the county or at any time fixed by law for the levy and assessment of taxes, levy a tax not exceeding one-half mill on the dollar of assessed valuation, upon all property in the county, the proceeds of which shall be used solely for the purpose of providing for the shooting, poisoning, trapping or otherwise catching or killing of rodents in said county. The fund to be provided, to be raised in accordance with this section, shall be denominated the "Rocky Mountain spotted fever control fund," and shall be kept separate and distinct by the county treasurer, and shall be expended by the

69-1022

board of county commissioners, and at such times and at any place in the county, and in such manner as is desired by the state board of entomology to secure the abatement or extermination of rodents which are hosts of any tick transmitting Rocky Mountain spotted fever.

History: En. Sec. 2, Ch. 24, L. 1923.

Collateral References Counties 161, 192. 20 C.J.S. Counties §§ 231, 281.

69-1022. (2561.3) Report of agents—compensation. Any person appointed by the board of county commissioners under the provisions of this act shall at the end of each month, make a sworn statement to the county of the time expended in shooting, poisoning, trapping or otherwise catching and killing rodents, exclusive of time going to and returning from work, and such person shall be paid at the rate not to exceed three dollars and fifty cents (\$3.50) per day of eight hours.

History: En. Sec. 3, Ch. 24, L. 1923.

Collateral References Health \$\sim 7(2)\$. 39 C.J.S. Health \$\\$ 8, 49.

69-1023. (2561.4) Commissioners may purchase materials. The board of county commissioners of any county may, from time to time, purchase such quantities and amounts of poisons, traps or other materials as may be necessary to carry out the provisions of this act to shoot, poison, trap or otherwise catch or kill rodents in any Rocky Mountain spotted fever control districts of the state board of entomology within the limits of the county concerned.

History: En. Sec. 4, Ch. 24, L. 1923.

Counties 158. 20 C.J.S. Counties \$ 234.

69-1024. (2561.5) "Rodents" defined. The term "rodent" as used within the limits of this act shall include such rodent or rodents as are known to be hosts of any tick which transmits Rocky Mountain spotted fever and are required to be exterminated by those regulations of the state board of entomology which are in force in any county concerned in the year during which the appropriation shall be made.

History: En. Sec. 5, Ch. 24, L. 1923.

69-1025. (2561.6) Repealing clause—supplemental nature of act. All acts or parts of acts in conflict herewith are hereby repealed; provided, however, that except as herein otherwise specified this act shall be construed as supplemental to and a part of all laws of this state relating to the control of Rocky Mountain spotted fever.

History: En. Sec. 6, Ch. 24, L. 1923.

CHAPTER 11

VENEREAL DISEASE CONTROL

Section 69-1101. Venereal diseases—authority of state board of health to co-operate with federal authorities in suppression.

69-1102. Acceptance and disbursement of federal moneys for control of venereal disease.

69-1103. Venereal diseases dangerous to public health.

Record of venereal cases to be kept—reporting cases. 69-1105. Quarantine—examination and treatment of suspects.

69-1106. Isolation hospitals.

69-1107. Pay patients.

69-1108. Examination and treatment of prisoners.

Quarantine of infected persons. 69-1109. 69-1110.

Instruction of patients in disease.

- Duty of physician or other person consulted concerning disease. 69-1111.
- 69-1112. Druggists and unlicensed persons prohibited from prescribing—duty of druggists.

69-1113. Certificates of freedom from disease.

- 69-1114. Inaccessibility of records to public.
- 69-1115. Rules and regulations for the control of venereal diseases.

69-1116. Penalty for violation of act or regulations.

69-1117. Blood sample from pregnant women to be tested for syphilis. 69-1118.

Result of tests to be reported to state board of health.

Report of birth shall state whether such blood test was made. 69-1119.

69-1120. Use of information by board.

69-1121. Violation penalized.

69-1101. (2562) Venereal diseases—authority of state board of health to co-operate with federal authorities in suppression. For the purpose of prevention, control and treatment of venereal diseases, the state board of health shall have authority to co-operate in the state of Montana with the federal public health service created by acts of Congress of the United States, including section 246 under chapter 6A, title 42, United States Code, Annotated, and acts hereafter amendatory thereof and supplemental thereto, and acts of the Congress of the United States appropriating money for such activities, as such appropriations are, from time to time, made by the Congress. The state board of health shall, itself, irrespective of appropriations, if any, made by the Congress to the state for the prevention, control and treatment of venereal diseases, undertake to prevent, control and prescribe treatments for such diseases in such ways and by such means, including education campaigns, as may be practicable, and within the limits of funds supplied for such purposes by the legislative assembly. In carrying out and discharging the duties hereby assigned to it in the field of venereal disease, the board may appoint such personnel, to serve subject to its orders and directives, as may be reasonably necessary to realize the objectives in the field, and as may be compensated within the limits of appropriations made by the legislative assembly, or by the Congress.

History: En. Sec. 1, Ch. 86, L. 1919; re-en. Sec. 2562, R. C. M. 1921; amd. Sec. 12, Ch. 264, L. 1955.

Collateral References Health € 22 et seq. 39 C.J.S. Health § 12 et seq.

69-1102. (2563) Acceptance and disbursement of federal moneys for control of venereal disease. The state treasurer is hereby authorized to accept, under the conditions of said acts of Congress, and other acts applicable to the subject matter, and to disburse, under the direction and control of the state board of health in compliance with such acts, all moneys received by or allocated to the state of Montana, under said acts of Congress, or otherwise allotted and paid to the state of Montana by the government of the United States for the prevention, control and treatment of venereal diseases.

History: En. Sec. 2, Ch. 86, L. 1919; re-en. Sec. 2563, R. C. M. 1921; amd. Sec. 13, Ch. 264, L. 1955.

(2564) Venereal diseases dangerous to public health. That 69-1103. syphilis, gonorrhea, and chancroid, hereinafter designated as venereal diseases, are hereby declared to be contagious, infectious, communicable, and dangerous to the public health. It shall be unlawful for anyone infected with these diseases, or any of them, to expose another person to infection.

History: En. Sec. 1, Ch. 106, L. 1919; re-en. Sec. 2564, R. C. M. 1921.

Collateral References Health € 22. 37.

39 C.J.S. Health §§ 30, 31. References In re Caselli, 62 M 201, 202, 204 P 364. 69-1104. (2565) Record of venereal cases to be kept—reporting cases.

Any physician or other person who makes a diagnosis in or treats a case of syphilis, gonorrhea, or chancroid, and every superintendent or manager of a hospital, dispensary, or charitable or penal institution, in which there is a case of venereal disease, shall keep a record thereof, which shall show the name and address or the office number, age, sex, color, and occupation of the diseased person, and the date of onset of the disease, and the probable source of infection. Every name entered in such record shall be assigned a number, commencing with No. 1 and continuing in numerical order, and shall report such case immediately in writing to the local or county health officer, giving the number assigned to such diseased person, together with the probable source of infection; provided, that the name and address shall not be given in such report, except as hereinafter specifically provided. Said report shall be enclosed in a sealed envelope and sent to the local or county health officer, who shall report weekly on the prescribed form to the state board of health all cases reported to him.

History: En. Sec. 2, Ch. 106, L. 1919; re-en. Sec. 2565, R. C. M. 1921.

Collateral References Health@=34.

39 C.J.S. Health §§ 19, 26.

References

In re Caselli, 62 M 201, 202, 204 P 364,

69-1105. (2566) Quarantine—examination and treatment of suspects. State, county, and local health officers, their authorized deputies or agents, within their respective jurisdictions, are hereby directed and empowered, when in their judgment it is necessary or desirable to protect or safeguard the public health, or to restrict or suppress prostitution, to make examinations of persons reasonably suspected of being infected with venereal disease, and of prostitutes and of any persons reasonably suspected of engaging in promiscuous sexual intercourse, and to detain such persons until the results of such examinations are known, to require persons infected with venereal disease to report for treatment to a reputable physician and continue treatment until cured, or to submit to treatment provided at public expense until cured; and also, when in their judgment it is necessary to protect the public health, to isolate or quarantine persons infected with venereal disease. Such examinations may be made repeatedly as often as deemed advisable or desirable. It shall be the duty of all local, county, and state health officers, or their authorized deputies, within their respective jurisdictions, to investigate sources of infection of venereal disease, to cooperate with the proper officials whose duty it is to enforce laws directed

against prostitution, and otherwise to use every proper means for the repression of prostitution.

History: En. Sec. 3, Ch. 106, L. 1919; re-en. Sec. 2566, R. C. M. 1921; amd. Sec. 1, Ch. 126, L. 1943.

Detention of Suspect

A person placed in quarantine because affected with a communicable disease may, on habeas corpus, challenge the right of the authorities to continue his detention if the facts upon which the order was made no longer exist. In re Caselli, 62 M 201, 202, 204 P 364.

The provisions of the Fourteenth Amendment to the Constitution of the United States, and of sections 6 and 7 of Article III of the state Constitution, to the effect that no person may be deprived of his liberty without due process of law, have no application to the case of one detained in quarantine because affected with a dangerous communicable disease. In re Caselli, 62 M 201, 202, 204 P 364.

Evidence showing that a woman had

Evidence showing that a woman had been plying her trade as a prostitute within a short time prior to her arrest by the county health officer under Ch. 106, Laws 1919 (69-1103 to 69-1116), and detention in quarantine on the ground that she was affected with gonorrhea, was a

constant associate of prostitutes, etc., held sufficient to warrant her detention until such time as it was safe to allow her to go at large. In re Caselli, 62 M 201, 202, 204 P 364.

Establishment of Quarantine

The legislature under its police power may enact laws authorizing the establishment of quarantine regulations and requiring the detention of persons affected with contagious diseases dangerous to the public health without resort to a preliminary judicial proceeding to determine the character of the disease and the facts constituting the danger to public health. In re Caselli, 62 M 201, 202, 204 P 364.

Collateral References

Health \$\sim 23, 24.
39 C.J.S. Health \$\\$ 13, 15, 16, 17, 20, 28.
25 Am. Jur. 312, Health, \\$ 34.

Compulsory examination for venereal disease. 2 ALR 1332 and 22 ALR 1189.
Constitutionality, construction, and ap-

constitutionality, construction, and application of statutes, ordinances, and regulations concerning the prevention and cure of venereal diseases. 127 ALR 421.

69-1106. (2567) Isolation hospitals. The county board of health of each county shall provide an isolation hospital for the care and treatment of all persons within the county suffering from venereal diseases, and shall make all necessary rules and regulations for the conduct and management thereof; provided, however, that the county board of health of any county may, in its discretion, if no isolation hospital has been established in such county, contract for the care and treatment of persons suffering from said diseases, with any county of the state that maintains an isolation hospital for the care and treatment of such diseases, or may contract with any private institution for the care and treatment of any such patients.

History: En. Sec. 4, Ch. 106, L. 1919; re-en. Sec. 2567, R. C. M. 1921.

References

In re Caselli, 62 M 201, 202, 204 P 364.

Collateral References Health©=24. 39 C.J.S. Health §§ 15, 17.

69-1107. (2568) Pay patients. Every person who is committed to, detained, or treated in such isolation hospitals, and who is financially able, shall be required to pay all expenses for care and treatments while detained in such hospital, and the county board of health is authorized to maintain a civil action in the name of the county to recover therefor.

History: En. Sec. 5, Ch. 106, L. 1919; re-en. Sec. 2568, R. C. M. 1921.

69-1108. (2569) Examination and treatment of prisoners. All persons who shall be confined or imprisoned in any state, county, or city prison in

the state shall be examined for, and if infected, treated for venereal diseases by the health authorities or their deputies. The prison authorities of any state, county, or city prison are directed to make available to the health authorities such portion of any state, county, or city prison as may be necessary for a clinic or hospital, wherein all persons who may be confined or imprisoned in any such prison, and who are infected with venereal disease at the time of the expiration of their terms of imprisonment, and, in case no other suitable place for isolation or quarantine is available, such other persons as may be isolated or quarantined under the provisions of section 69-1105 shall be isolated and treated at public expense until cured; or, in lieu of such isolation, any of such persons may, in the discretion of the local, county, or state health officer, be required to report for treatment to a licensed physician, or submit to treatment provided at public expense as provided in section 69-1106. Nothing herein contained shall be construed to interfere with the service of any sentence imposed by a court as a punishment for the commission of crime.

History: En. Sec. 6, Ch. 106, L. 1919; re-en. Sec. 2569, R. C. M. 1921.

Collateral References Health\$\infty 23; Prisons\$\infty 17. 39 C.J.S. Health \$\ 13, 16, 17, 20, 28.

69-1109. (2570) Quarantine of infected persons. Local and county health officers are authorized and directed to quarantine persons who have, or who, after examination, are reasonably suspected of having syphilis, gonorrhea, or chancroid, whenever in the opinion of said local or county health officer, or the state board of health or its secretary, quarantine is necessary for the protection of the public health. In establishing quarantine the health officer shall designate and define the limits of the area in which the person known to have, or reasonably suspected of having, syphilis, gonorrhea, or chancroid, and his or her immediate attendant are to be quarantined, and no other person than the attending physician shall enter or leave the area of quarantine without the permission of the local or county health officer. No one but the local, county or state health officer shall terminate said quarantine, and this shall not be done until the diseased person has become noninfectious, as determined by the local, county, or state health officer or his authorized deputy, through the clinical examination and necessary laboratory tests, or until permission has been given by the state board of health or its secretary.

History: En. Sec. 7, Ch. 106, L. 1919; re-en. Sec. 2570, R. C. M. 1921.

Detention of Suspect

A person placed in quarantine because affected with a communicable disease may, on habeas corpus, challenge the right of the authorities to continue his detention if the facts upon which the order was made no longer exist. In re Caselli, 62 M 201, 202, 204 P 364.

The provisions of the Fourteenth Amendment to the Constitution of the United States, and of sections 6 and 7 of Article III of the state Constitution, to the effect that no person may be deprived of his liberty without due process of law,

have no application to the case of one detained in quarantine because affected with a dangerous communicable disease. In re Caselli, 62 M 201, 202, 204 P 364.

Evidence showing that a woman had been plying her trade as a prostitute within a short time prior to her arrest by the county health officer under Ch. 106, Laws 1919 (69-1103 to 69-1116), and detention in quarantine on the ground that she was affected with gonorrhea, was a constant associate of prostitutes, etc., held sufficient to warrant her detention until such time as it was safe to allow her to go at large. In re Caselli, 62 M 201, 202, 204 P 364.

Establishment of Quarantine

The legislature under its police power may enact laws authorizing the establishment of quarantine regulations and requiring the detention of persons affected with contagious diseases dangerous to the public health without resort to a preliminary judicial proceeding to determine the character of the disease and the facts constituting the danger to public health. In re Caselli, 62 M 201, 202, 204 P 364.

69-1110. (2571) Instruction of patients in disease. It shall be the duty of every physician, and every other person who examines or treats a person having syphilis, gonorrhea, or chancroid, to instruct such person in measures for preventing the spread of such diseases, and inform such person of the necessity for treatment until cured, and to hand such person a copy of the circular of information obtainable for this purpose from the state board of health.

History: En. Sec. 8, Ch. 106, L. 1919; re-en. Sec. 2571, R. C. M. 1921.

69-1111. (2572) Duty of physician or other person consulted concerning When a person applies to a physician or other person for the diagnosis or treatment of syphilis, gonorrhea, or chancroid, it shall be the duty of the physician or person so consulted to inquire of and ascertain from the person seeking such diagnosis or treatment, whether such person has theretofore consulted with or has been treated by any other physician or person, and, if so, to ascertain the name and address of the physician or person last consulted. It shall be the duty of the applicant for diagnosis or treatment to furnish this information, and a refusal to do so or a falsification of the name and address of such physician or person consulted by such applicant shall be deemed a violation of these regulations. It shall be the duty of the physician or other person whom the applicant consults to notify the physician or other person last consulted of the change of advisers. Should the physician or person previously consulted fail to receive such notice within ten days after the last date upon which the patient was instructed by him to appear, it shall be the duty of such physician or person to report to the local or county health officer the name and address of such venereally diseased person.

If an attending physician or other person knows or has good reason to suspect that a person having syphilis, gonorrhea, or chancroid is so conducting himself or herself as to expose other persons to infection, or is about so to conduct himself or herself, he shall notify the local or county health officer of the name and address of the diseased person, and the essential facts in the case.

History: En. Sec. 9, Ch. 106, L. 1919; re-en. Sec. 2572, R. C. M. 1921.

References

In re Caselli, 62 M 201, 202, 204 P 364.

Collateral References

Health \$\infty\$34; Physicians and Surgeons \$\infty\$10.

39 C.J.S. Health \$\xi\$19, 26; 70 C.J.S. Physicians and Surgeons \$\xi\$3.

69-1112. (2573) Druggists and unlicensed persons prohibited from prescribing—duty of druggists. No druggist or other person, not a physician licensed under the laws of the state, shall prescribe or recommend to any person any drugs, medicines, or other substances to be used for the cure or alleviation of genorrhea, syphilis, or chancroid, or shall compound any drugs

or medicines other than proprietary for said purpose, from any written formula or order not written for the person for whom the drugs or medicines are compounded, and not signed by a physician licensed under the laws of the state. All druggists are required to keep a record of the names and addresses of all persons to whom proprietary or patent medicines, commonly or presumably used in the treatment of venereal diseases, are sold or supplied to, and shall forward a report to the proper health officer at the end of each week, giving the names and addresses of such persons and the remedy sold in each case.

History: En. Sec. 10, Ch. 106, L. 1919; re-en. Sec. 2573, R. C. M. 1921.

28 C.J.S. Druggists § 6; 70 C.J.S. Physicians and Surgeons § 10.

Collateral References

Druggists 5; Physicians and Surgeons 5.

69-1113. (2574) Certificates of freedom from disease. Physicians, health officers, and all other persons are prohibited from issuing certificates of freedom from venereal disease, providing this rule shall not prevent the issuance of necessary statements of freedom from infectious diseases, written in such form or given under such safeguards that their use in solicitation for sexual intercourse would be impossible. Such certificates shall not be used or exhibited for solicitation for immoral purposes.

History: En. Sec. 11, Ch. 106, L. 1919; re-en. Sec. 2574, R. C. M. 1921.

References

In re Caselli, 62 M 201, 202, 204 P 364.

Collateral References

Physicians and Surgeons 10.
70 C.J.S. Physicians and Surgeons § 3 et seq.

69-1114. (2575) Inaccessibility of records to public. All information and reports concerning persons infected with venereal diseases shall be inaccessible to the public.

History: En. Sec. 12, Ch. 106, L. 1919; re-en. Sec. 2575, R. C. M. 1921.

Collateral References Health@=34. 39 C.J.S. Health §§ 19, 26.

69-1115. (2576) Rules and regulations for the control of venereal diseases. The state board of health is hereby empowered and directed to make such rules and regulations as shall, in its judgment, be necessary for the carrying out of the provisions of this act, including rules and regulations providing for the control and treatment of persons isolated or quarantined under the provisions of section 69-1105, and such other rules and regulations, not in conflict with provisions of this act, concerning the control of venereal diseases and concerning the care, treatment, and quarantine of persons infected therewith, as it may from time to time deem advisable. All such rules and regulations so made shall be of force and binding upon all county and municipal health officers and other persons affected by this act, and shall have the force and effect of law.

History: En. Sec. 13, Ch. 106, L. 1919; re-en. Sec. 2576, R. C. M. 1921.

Collateral References Health \$\sim 20. 39 C.J.S. Health \$\sim 2, 14.

References

In re Caselli, 62 M 201, 202, 204 P 364.

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69-1116. (2577) Penalty for violation of act or regulations. Any person who shall violate any of the provisions of this act, or any lawful rule or regulation made by the state board of health, pursuant to the authority herein granted, or who shall fail or refuse to obey any lawful order issued by the state, county, or local health officer, pursuant to the authority granted in this act, shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than a year, or by both such fine and imprisonment.

History: En. Sec. 14, Ch. 106, L. 1919; re-en. Sec. 2577, R. C. M. 1921.

Collateral References Health@-38. 39 C.J.S. Health § 30.

69-1117. Blood sample from pregnant women to be tested for syphilis. Every physician or other person authorized by law to practice obstetrics who shall be attending pregnant women in the state for conditions relating to their pregnancy during the period of gestation or at delivery shall, in the case of every woman so attended, take or cause to be taken a sample of blood of such woman at the time of first professional visit or within ten (10) days thereafter, and shall submit such sample to an approved laboratory for a standard serological test for syphilis. Every other person permitted by law to attend pregnant women in the state, but not permitted by law to take blood samples, shall cause a sample of blood of such pregnant women to be taken by a physician duly licensed to practice medicine and surgery, obstetrics, or other person authorized by law to take such sample of blood and have such sample submitted to an approved laboratory for a standard serological test for syphilis.

History: En. Sec. 1, Ch. 119, L. 1945.

69-1118. Result of tests to be reported to state board of health. The results of all such laboratory tests shall be reported to the state board of health of Montana on standard forms prescribed and furnished by the state board of health. For the purpose of this act a standard serological test shall be a test for syphilis approved by the Montana state board of health, and shall be made at a laboratory approved to make such tests by said board. Such laboratory tests, as are required by this act, shall be made on request without charge at the Montana state board of health laboratory. In the event that an erroneous report has been made it shall be the duty of the Montana state board of health to expunge the error from the record.

History: En. Sec. 2, Ch. 119, L. 1945.

69-1119. Report of birth shall state whether such blood test was made. In reporting every birth and stillbirth, physicians and others required to make such reports, shall state on the certificate whether a blood test for syphilis has been made upon a specimen of blood taken from the woman who bore the child for which a birth or stillbirth certificate is filed and the approximate date when the specimen was taken; provided that no birth or stillbirth certificate shall show the result of such test. If no test was made the reason shall be stated.

History: En. Sec. 3, Ch. 119, L. 1945.

69-1120. Use of information by board. The Montana state board of health shall be authorized to use the information derived from pregnancy serological tests for such follow-up procedures as are required by law or deemed necessary by said board for the protection of the public health.

The Montana state board of health shall provide the necessary printing, clerical and other technical assistance involved in the administration of this act or any other expenditures necessary for carrying out its provisions and purposes.

History: En. Sec. 4, Ch. 119, L. 1945.

69-1121. Violation penalized. Any physician or other person engaged in attendance upon a pregnant woman during the period of gestation or at delivery or any representative of a laboratory who violates the provisions of this act shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than one hundred (\$100.00) dollars; provided, however, that any physician or other person engaged in attendance upon a pregnant woman who requests a sample of blood in accordance with the provisions of section 69-1117, and whose request is refused, shall not be guilty of violation of the provisions of said section.

History: En. Sec. 5, Ch. 119, L. 1945.

CHAPTER 12

SHODDY-CONTROL, MANUFACTURE AND SALE

Section 69-1201. Manufacture and sale of shoddy prohibited.

69-1202. Definition of shoddy.

69-1203. Health boards to enforce act and make inspections.

69-1204. Prosecutions.

69-1205. Penalty for violation of act.

69-1206. "Mattress" defined.

69-1207. Remaking mattresses—use of material regulated.

69-1208. Sale of unlawfully made mattresses forbidden.

69-1209. Tag or label required.

69-1210. Contents of statement—size of type.

69-1211. "Felt."

69-1212. Use of word "floss" restricted.

69-1213. Misleading terms forbidden.

69-1214. Sterilization of used mattress required.

69-1215. State board of health—authority of.

69-1216. Removal or alteration of tag.

69-1217. Condemnation of mattresses unlawfully made.

69-1218. Separate offenses.

69-1219. Violation a misdemeanor.

69-1220. Enforcement of act.

69-1201. (2615) Manufacture and sale of shoddy prohibited. No person, firm, or corporation, shall, within this state, sell, offer for sale, or manufacture, what is commonly known as shoddy, or sell, offer for sale or manufacture mattresses, pillows, couches, couch pads, or lounges, containing shoddy in whole or in part.

History: En. Sec. 1, Ch. 146, L. 1915; re-en. Sec. 2615, R. C. M. 1921.

Collateral References

Health€=33.

39 C.J.S. Health §§ 21, 28, 29. 46 Am. Jur. 199, Sales, § 4.

69-1202. (2616) Definition of shoddy. The term "shoddy," as used in this act, shall include all material made or manufactured of rags, wearing apparel, clothing, rugs, carpets or blankets.

History: En. Sec. 2, Ch. 146, L. 1915; re-en. Sec. 2616, R. C. M. 1921.

69-1203. (2617) Health boards to enforce act and make inspections. It shall be the duty of all boards and departments of health, health officers, or officials discharging similar duties in the state of Montana, to enforce the provisions of this chapter, and they shall have power in the performance of their official duties to enter any store or manufacturing establishment where the articles mentioned in section 69-1201 are manufactured or are for sale, and make such examination as they deem necessary in order to ascertain whether or not the provisions of this chapter are being violated.

History: En. Sec. 3, Ch. 146, L. 1915; re-en. Sec. 2617, R. C. M. 1921.

69-1204. (2618) **Prosecutions.** It shall be the duty of the attorney general and prosecuting attorneys of the counties of this state to prosecute all cases arising under the provisions of this chapter.

History: En. Sec. 4, Ch. 146, L. 1915; re-en. Sec. 2618, R. C. M. 1921.

69-1205. (2619) Penalty for violation of act. Every person, firm, or corporation violating any of the provisions of this chapter shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for not less than thirty days, nor more than six months, or both such fine and imprisonment.

History: En. Sec. 5, Ch. 146, L. 1915; re-en. Sec. 2619, R. C. M. 1921.

Collateral References Health@=38. 39 C.J.S. Health § 30.

69-1206. "Mattress" defined. The term "mattress" as used herein shall be construed to mean any quilted pad, comforter, mattress, mattress pad, hammock pad, bunk quilt, settees, couches, day beds, davenports and overstuffed chairs, cushion or pillow stuffed or filled with wool, hair, cotton, cotton linters, kapok, feathers or other soft material capable of use for sleeping or reclining purposes.

History: En. Sec. 1, Ch. 70, L. 1941.

69-1207. Remaking mattresses—use of material regulated. No person, firm or corporation, by himself or by his agents, servants or employees shall employ and/or use in the making, remaking and/or renovating of any mattress any material of any kind that has been used in or has formed a part of any mattress used in or about any public or private hospital or institution for the treatment of persons suffering from disease or for or about any person having any infectious or contagious disease; or any material known as "shoddy," or material made in whole or in part from old or worn clothing, carpets and/or other fabrics or material previously used, or any other fabric or material from which shoddy is constructed, or any material not herein specifically mentioned of which prior use has been made,

unless any and all of said materials have been thoroughly sterilized and disinfected by a process approved by the state board of health.

History: En. Sec. 2, Ch. 70, L. 1941.

69-1208. Sale of unlawfully made mattresses forbidden. No person, firm or corporation shall sell, offer for sale, deliver, rent, consign and/or have in his possession for the purpose of sale, delivery, and/or consignment any mattress made, remade and/or renovated in violation of the above provision.

History: En. Sec. 3, Ch. 70, L. 1941.

69-1209. Tag or label required. No person, firm or corporation shall sell or offer for sale either at wholesale or retail, or otherwise, repair or renovate, deliver, rent or consign or have in his possession with intent to sell, repair, renovate, deliver, rent or consign any mattress that does not bear thereon, plainly and indelibly stamped upon a muslin or linen tag, or label not smaller than three (3) inches square, securely sewed to the covering thereof, a statement as hereinafter provided.

History: En. Sec. 4, Ch. 70, L. 1941.

69-1210. Contents of statement—size of type. The statement required under the foregoing section shall be in the English language in type not smaller than twenty-four (24) point condensed Gothic type in words and form as follows:

Materials Used in Filling

Percentage of kinds of materials	
Gross weight of materials, including covering	Pounds.
Vendor	***************************************
Address	. This article
is tagged and made in conformance with the requirements of	chapter,
laws of Montana, 1941.	,

History: En. Sec. 5, Ch. 70, L. 1941.

69-1211. "Felt." Whenever the term "felt" is used in any statement, said materials shall be in layers as processed by felting machines and it shall be indicated whether said felt is "felted cotton" or "felted linters."

History: En. Sec. 6, Ch. 70, L. 1941.

69-1212. Use of word "floss" restricted. It shall be unlawful to use in any statement concerning any mattress the word "floss," or words of like import, if there has been used in filling said mattress any materials which are not termed as "kapok."

History: En. Sec. 7, Ch. 70, L. 1941.

69-1213. Misleading terms forbidden. It shall be unlawful to use in the description hereinbefore provided for, any misleading term or designation, or term or designation likely to mislead.

History: En. Sec. 8, Ch. 70, L. 1941.

69-1214. Sterilization of used mattress required. (a) No person or corporation by himself or by his agents, servants, or employees, shall cause to

be renovated or remade, or buy, sell, offer for sale, or have in his possession with intent to sell, any renovated, or remade, or used, or secondhand mattress unless the same has been sterilized and disinfected by a process approved by the state board of health.

(b) In the case of mattresses made from material and/or materials known as "secondhand materials" or "shoddy material" the form of statement provided for in section 69-1210 shall contain a heading, in type not smaller than twenty-four (24) point condensed Gothic type the words "secondhand material."

History: En. Sec. 9, Ch. 70, L. 1941.

69-1215. State board of health—authority of. The state board of health shall have authority to prescribe, establish and enforce such rules and standards of grading, mixing and inspecting materials used in mattresses as will in its judgment promote public health and sanitation.

History: En. Sec. 10, Ch. 70, L. 1941.

69-1216. Removal or alteration of tag. The removal, alteration or defacement of any tag or label herein provided for shall constitute a misdemeanor.

History: En. Sec. 11, Ch. 70, L. 1941.

69-1217. Condemnation of mattresses unlawfully made. The state board of health shall have the right to condemn and seize any mattress which is found to be in violation of any of the provisions of this act or of any rule or regulation promulgated under the provisions of this act. Goods condemned and seized shall be presented before the nearest police judge or justice of the peace, together with all information obtained; and said police judge or said justice of the peace shall order such goods disposed of or destroyed in such manner as in his judgment will satisfy the requirements of this act.

History: En. Sec. 12, Ch. 70, L. 1941.

69-1218. Separate offenses. The unit for a separate and distinct offense in violation of this act shall be each and every mattress made, remade, renovated, sold, offered for sale, delivered, consigned, rented or possessed with intent to sell, deliver, consign or rent, contrary to the provisions hereof.

History: En. Sec. 13, Ch. 70, L. 1941.

69-1219. Violation a misdemeanor. Any person or corporation violating the provisions of this act shall be guilty of a misdemeanor.

History: En. Sec. 14, Ch. 70, L. 1941.

69-1220. Enforcement of act. The enforcement of the provisions of this act shall be under the supervision of the state board of health. Such officers and such persons as may be designated by the state board of health shall have access to any premises or any records held by any person containing any information pertaining to the article or material in question.

History: En. Sec. 15, Ch. 70, L. 1941.

CHAPTER 13

PUBLIC AND OTHER WATER SUPPLIES—CONTROL BY STATE BOARD OF HEALTH

Section 69-1301. State board of health to have control of public and other water supplies. Examination of waters. 69-1302. Publication of orders, rules and regulations. 69-1303. Analysis of water-rules and regulations concerning. 69-1304. 69-1305. Disposition of fees collected. Penalty for violation of regulations. 69-1306. 69-1307. Employment of agents and servants. 69-1308. Duties of the board. 69-1309. Pollution of water supply. Protection of watersheds. 69-1310. Record of well drilling to be kept as required by state board of 69-1311. health. Information concerning wells to be public records. 69-1312. 69-1313. Penalties. 69-1314. Complaints and investigations. Agents and servants of boards may enter buildings. 69-1315. 69-1316. Appeals to the district court from orders of the state board of health. 69-1317. Jurisdiction of the district court. Establishment of experimental stations. 69-1318. Biennial reports. 69-1319. 69-1320. Penalties for violations of act. 69-1321 to 69-1325. Repealed. 69-1326. Short title. 69-1327. Statement of policy. 69-1328. Definitions. Administration. 69-1329. 69-1330. Powers and duties of the council. 69-1331. Powers and duties of the board. 69-1332. Pollution unlawful—permits. 69-1333. Inspection and entry. 69-1334. Classifications and standards. 69-1335. Hearings and review. 69-1336. Penalties. 69-1337. Compliance. 69-1338. Injunction. 69-1339. State officers to co-operate with the state water pollution council. 69-1340. Repeal. 69-1341. Preservation of rights. Declaration of state public policy on subdivisions. "Subdivision" defined. 69-1342. 69-1343. Maps and plats subject to filing and sanitary requirements. 69-1344. 69-1345. Filing of map or plat subject to sanitary restriction—submission to and approval by board of health-removal or modification of restriction. 69-1346. Rules and regulations—scope.

69-1301. (2641) State board of health to have control of public and other water supplies. That the state board of health shall have the general oversight and care of all inland waters and of all streams, lakes and ponds used by any city, town, or public institution, or by any water or ice company or person in this state, as sources of water supply for domestic use, and of all springs, streams, and watercourses tributary thereto. It shall be provided with maps, plans, and documents suitable for such purposes, and shall keep records of all its transactions relative thereto.

History: En. Sec. 1, Ch. 177, L. 1907; R. C. M. 1921; amd. Sec. 1, Ch. 127, L. Sec. 1559, Rev. C. 1907; re-en. Sec. 2641, 1945.

References

Campbell v. City of Helena, 92 M 366, 379, 16 P 2d 1.

Collateral References

Waters and Water Courses € 36. 94 C.J.S. Waters § 229.

22 Am. Jur. 698, Fish and Fisheries, § 43; 56 Am. Jur., Waters, p. 808, §§ 384 et seq.; p. 826, §§ 405 et seq.

Power of board of health to prescribe means or methods of keeping water supply free of impurities. 23 ALR 228.

Constitutionality and construction of statutes and ordinances for protection of municipal water supply. 72 ALR 673.

Law Review

Clark, "Ground Water Legislation in the Light of Experience in the Western States," 22 Mont. L. Rev. 42, 57 (Fall 1960).

69-1302. (2642) Examination of waters. Said state board of health may cause examination of waters to be made to ascertain their purity and fitness for domestic use, or their liability to impair the interests of the public or of persons lawfully using them, or to imperil the public health. It may make rules and regulations to prevent pollution, and to secure the sanitary protection of all such waters as are used for domestic purposes.

History: En. Sec. 2, Ch. 177, L. 1907; Sec. 1560, Rev. C. 1907; re-en. Sec. 2642, R. C. M. 1921.

References

Campbell v. City of Helena, 92 M 366, 379, 16 P 2d 1.

Collateral References

56 Am. Jur. 831, Waters, § 412.

69-1303. (2643) Publication of orders, rules and regulations. The publication of an order, rule, or regulation made by the state board of health under the provisions of this act in a newspaper of the city or town in which such order, rule, or regulation is to take effect, or, if no newspaper is published, in such city or town, the posting of a copy of such order, rule, or regulation in a public place in such city or town, shall be legal notice to all persons, and an affidavit of such publication or posting by the person causing such notice to be published or posted, filed, and recorded, with a copy of the notice, in the office of the clerk of such city or town, shall be admitted as evidence of the time at which, and the place and manner in which the notice was given.

History: En. Sec. 3, Ch. 177, L. 1907; Sec. 1561, Rev. C. 1907; re-en. Sec. 2643, R. C. M. 1921.

69-1304. (2644) Analysis of water—rules and regulations concerning. The state board of health shall make and publish in the monthly bulletin of that board, rules and regulations for the collection of samples and analyses of water, either natural or treated, furnished by municipalities, corporations, companies, or individuals to the public, and shall fix the fees for such services, rendered under said rules and regulations, to cover the cost of the service.

History: En. Sec. 1, Ch. 126, L. 1917; re-en. Sec. 2644, R. C. M. 1921.

References

Campbell v. City of Helena, 92 M 366, 379, 16 P 2d 1.

Collateral References

Food 2, 3. 36A C.J.S. Food §§ 3, 10, 11, 13.

69-1305. (2645) Disposition of fees collected. The fees collected by the state board of health under this act shall be turned over to the state treasurer who shall place them in the general fund of the state of Montana.

History: En. Sec. 2, Ch. 126, L. 1917; re-en. Sec. 2645, R. C. M. 1921; amd. Sec. 1, Ch. 34, L. 1925.

69-1306. (2646) Penalty for violation of regulations. Every corporation, railway, common carrier, company, or individual that shall fail to comply with the regulations prescribed by the state board of health under this act, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty dollars nor more than five hundred dollars.

History: En. Sec. 3, Ch. 126, L. 1917; re-en. Sec. 2646, R. C. M. 1921.

69-1307. (2647) Employment of agents and servants. Said state board of health may appoint, employ, and fix the compensation of such agents, clerks, servants, engineers, and expert assistants as it considers necessary. Such agents and servants shall cause the provisions of law relative to the pollution of water and of the rules and regulations of said board to be enforced.

History: En. Sec. 4, Ch. 177, L. 1907; Sec. 1562, Rev. C. 1907; re-en. Sec. 2647, R. C. M. 1921.

References

Campbell v. City of Helena, 92 M 366, 379, 16 P 2d 1.

(2648) **Duties of the board.** Said board shall consult with and advise the authorities of cities and towns, and persons having, or about to have, systems of water supply, drainage, and sewerage, as to the most appropriate source of water supply, and the best method of assuring its purity, or as to the best method of disposing of their drainage or sewage with reference to the existing and future needs of other cities, towns, or persons which may be affected thereby. It shall also consult with and advise all corporations, companies, or persons engaged or intending to engage in any manufacturing or other business, whose drainage or sewage may tend to pollute any inland water, as to the best method of preventing such pollution, and it may conduct experiments to determine the best methods of the purification or disposal of drainage or sewage. Cities, towns, and all other corporations, companies, or persons shall submit to said board, for its advice and approval, their proposed system of water supply, or of the disposal of drainage or sewage, and no city, town, or person or company shall proceed to build or install or enlarge or extend any system of water supply, drainage, or sewage disposal, without first obtaining the approval of the state board of health. In this section the term "drainage" means rainfall, surface, and subsoil water only, and "sewage" means domestic and manufacturing filth and waste.

History: En. Sec. 5, Ch. 177, L. 1907; Sec. 1563, Rev. C. 1907; re-en. Sec. 2648, R. C. M. 1921.

References Campbell v. City of Helena, 92 M 366,

69-1309. (2649) Pollution of water supply. That no sewerage, drainage, refuse, or polluting matter, of such kind and amount as either of itself or in connection with other matter, will corrupt, pollute, or impair the

379, 16 P 2d 1.

quality of the water of any spring, pond, lake, or stream used as a source of water or ice supply by a city, town or public institution or water or ice company or person for domestic use, or render it injurious to health, and no human excrement shall be discharged into any such stream, spring, lake, pond, or upon their banks or into any feeders of such spring, lake, pond or stream unless such sewerage, drainage, refuse, or polluting water shall have been purified, so as to render it harmless in such a manner and under such conditions and restrictions as the state board of health may direct.

History: En. Sec. 6, Ch. 177, L. 1907; Sec. 1564, Rev. C. 1907; amd. Sec. 2, Ch. 66, L. 1911; amd. Sec. 1, Ch. 26, L. 1917; re-en. Sec. 2649, R. C. M. 1921; amd. Sec. 2, Ch. 127, L. 1945.

References

Campbell v. City of Helena, 92 M 366, 379, 16 P 2d 1.

Collateral References

Pollution of oyster beds. 3 ALR 762. Measure of damages for pollution of stream. 38 ALR 1388 and 49 ALR 2d 253. Injunction against pollution of stream by private persons or corporations. 46 ALR 8.

Liability for pollution of stream by oil, water, or the like flowing from well. 19 ALR 2d 1033.

69-1310. (2650) Protection of watersheds. No municipal or other public or private corporation, and no company or person, shall hereafter construct, build, establish, or operate any railroad, logging road, logging camp, electric plant or manufacturing plant of any kind, upon or over any watershed of any public water supply system, unless such corporation, company, or person shall protect said water supply from pollution by such sanitary precautions as shall be approved by the state board of health, and any such corporation, company, or person intending to construct, build, or establish or operate any railroad, logging road, logging camp, electric plant, or manufacturing plant of any kind, upon the watershed of any public water supply system, shall furnish the state board of health with detailed plans and specifications of the sanitary precautions to be taken, which must be approved by said board.

History: En. Sec. 7, Ch. 177, L. 1907; Sec. 1565, Rev. C. 1907; re-en. Sec. 2650, R. C. M. 1921.

References

Campbell v. City of Helena, 92 M 366, 379, 16 P 2d 1.

Collateral References

Health 528; Waters and Water Courses 564 et seq. 39 C.J.S. Health § 21; 94 C.J.S. Waters § 229 et seq.

69-1311. (2650.1) Record of well drilling to be kept as required by state board of health. For the purpose of preserving the health of the public and to provide the state board of health with relevant information pertaining to water supply when obtained from water wells used for furnishing water, directly or indirectly, to or for public consumption or use, it is hereby made the duty of every person, firm, or corporation, drilling or causing to be drilled, any water well within the state of Montana, intended for use or actually used in furnishing water, directly or indirectly, to or for public consumption or use, to keep a complete and accurate record of the depth and thickness and character of the different strata penetrated in the drilling of any such well, together with such other pertinent information concerning said water well and the drilling thereof as the said board of health

may by rule or regulation require, such data to be furnished to the said board upon forms prescribed and furnished by it.

History: En. Sec. 1, Ch. 118, L. 1931.

39 C.J.S. Health §§ 21, 25, 29; 93 C.J.S. Waters § 174 et seq.

Collateral References

Health \$\infty\$ 31; Waters and Water Courses \$\infty\$ 99 et seq.

69-1312. (2650.2) Information concerning wells to be public records. Such information as is acquired by said board under the provisions hereof shall constitute public records and as such be available to the public at all reasonable times.

History: En. Sec. 2, Ch. 118, L. 1931.

69-1313. (2650.3) Penalties. Any person, firm or corporation, violating the provisions of this act, or rules and regulations prescribed pursuant hereto, or the lawful orders of the state board of health under said rules and regulations, shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine of not more than one hundred (\$100.00) dollars, or by imprisonment in the county jail for a period of not more than thirty (30) days, or by both such fine and imprisonment.

History: En. Sec. 3, Ch. 118, L. 1931.

69-1314. (2651) Complaints and investigations. Upon complaint to the state board of health, or the mayor or health officer of any city or town, or the managing board or officer of any public institution, or the president of an ice company, stating that manure, excrement, garbage, sewage, or any other matter which pollutes or tends to pollute the waters of any lake, pond, spring, stream, or watercourse used by such city or town, public institution, or company as a source of water supply, the said board shall cause a thorough investigation to be made of such alleged nuisance or pollution, and if, in its judgment, the public health so requires, shall, by order served upon the party causing or permitting such pollution, prohibit the continuance of such pollution, and shall order him to remove any such cause of pollution.

History: En. Sec. 8, Ch. 177, L. 1907; re-en. Sec. 1566, Rev. C. 1907; re-en. Sec. 2651, R. C. M. 1921.

Ex Parte Investigation

This section does not provide for a public trial, but contemplates an ex parte investigation by the state board of health; it may, therefore, upon its information from any source, and before it has heard

any testimony, make a valid order prohibiting a city from polluting a stream which is a source of water supply for domestic uses. Miles City v. State Board of Health, 39 M 405, 410, 102 P 696.

References

Campbell v. City of Helena, 92 M 366, 379, 16 P 2d 1.

69-1315. (2652) Agents and servants of boards may enter buildings. The agents and servants of said board may enter any building, structure, or premises for the purpose of ascertaining whether sources of pollution or danger to the water supply there exist, and whether the rules, regulations, and orders aforesaid are obeyed.

History: En. Sec. 9, Ch. 177, L. 1907; re-en. Sec. 1567, Rev. C. 1907; re-en. Sec. 2652, R. C. M. 1921.

Collateral References Health 27. 39 C.J.S. Health § 9. 69-1316. (2653) Appeals to the district court from orders of the state board of health. Whoever is aggrieved by any order of the state board of health passed under the provisions of this act may appeal therefrom to the district court of the county in which such order shall be effective. But such notice as the court shall order shall also be given to the mayor of the city or town, or president of the water company, or any other persons interested in such order. While the appeal is pending, the order of the state board of health shall be complied with, unless otherwise authorized by the state board of health.

History: En. Sec. 10, Ch. 177, L. 1907; re-en. Sec. 1568, Rev. C. 1907; re-en. Sec. 2653, R. C. M. 1921.

M 405, 410, 102 P 696; Campbell v. City of Helena, 92 M 366, 379, 16 P 2d 1.

References

Miles City v. State Board of Health, 39

Collateral References

Health 59-11. 39 C.J.S. Health §§ 11, 29, 38, 39.

69-1317. (2654) Jurisdiction of the district court. The district court of any county of the state shall have jurisdiction in equity, upon the application of the state board of health or of any person interested, to enforce its orders, or the orders, rules, and regulations of said board of health, and to restrain the use or occupation of the premises, or such portion thereof as said board may specify, on which said material is deposited or kept, or such other cause of pollution exists, until the orders, rules, and regulations of said board have been complied with.

History: En. Sec. 11, Ch. 177, L. 1907; re-en. Sec. 1569, Rev. C. 1907; re-en. Sec. 2654, R. C. M. 1921.

69-1318. (2655) Establishment of experimental stations. In order that the state board of health may at all times be prepared to give the best advice to cities, towns, public institutions, or private corporations, relative to the prevention or removal of pollutions of water, said board is hereby authorized to establish and maintain an experiment station for the purpose of studying the best methods of preventing pollution of water, and for the purification of water, and for the purification, disinfection, and disposal of sewage and domestic and manufacturing waste so as to prevent pollution of water, and said board is authorized to cause sanitary methods and systems in use outside of the state of Montana to be investigated and studied with a view of ascertaining their fitness for conditions in this state.

History: En. Sec. 12, Ch. 177, L. 1907; re-en. Sec. 1570, Rev. C. 1907; re-en. Sec. 2655, R. C. M. 1921.

Collateral References Health©=28.

39 C.J.S. Health § 21.

69-1319. (2656) Biennial reports. The state board of health shall biennially make a report to the legislature, through the governor, of its doings for the preceding period, recommending measures for the prevention of the pollution of such waters, and for the removal of polluting substance in order to protect and develop the rights and property of the state and municipalities therein, and to protect the public health, and recommend any legislation or plans for systems of main sewers necessary for the preservation of the public health, and for the purification and prevention of pollution of the ponds, lakes, springs, and inland waters of the state. It shall

also give notice to the attorney general of any violation of law relative to the pollution of water supplies and inland waters.

History: En. Sec. 13, Ch. 177, L. 1907; re-en. Sec. 1571, Rev. C. 1907; re-en. Sec. 2656, R. C. M. 1921.

69-1320. (2657) Penalties for violations of act. Whoever violates any of the provisions of this act, or any rule, regulation or order of the state board of health, made under the provisions of this act, shall be punished for each offense by a fine of not more than one thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.

History: En. Sec. 14, Ch. 177, L. 1907; re-en. Sec. 1572, Rev. C. 1907; re-en. Sec. 2657, R. C. M. 1921.

69-1321 to 69-1325. Repealed—Chapter 142, Laws of 1955.

Repeal
These sections (Secs. 1 to 5, Ch. 184,
L. 1949), relating to the Water Pollution
Control Act, were repealed by Sec. 15, Ch.

142, Laws 1955 (69-1340). A new Water Pollution Act is compiled as secs. 69-1326 to 69-1341.

69-1326. Short title. This act shall be known as the Water Pollution Act of the state of Montana.

History: En. Sec. 1, Ch. 142, L. 1955.

- **Statement of policy.** (a) Whereas a comprehensive program of water resource development for municipal and industrial water supply, irrigation, fish and wildlife conservation, and recreation is now in progress in this state, and, whereas pollution of the waters of this state may constitute a menace to public health and welfare, and may adversely affect livestock, wildlife, fish and aquatic life, and may progressively obstruct agricultural, industrial, recreational and other legitimate uses of water, and whereas the problem of water pollution in this state is closely related to the problem of water pollution in adjoining states, it is hereby declared to be the public policy of this state to conserve the waters of the state and to protect, maintain, and improve the quality and potability thereof for public water supplies, for the propagation of wildlife, fish and aquatic life, and for agricultural, industrial, recreational and other legitimate beneficial uses, to provide a comprehensive program in the public interest for the prevention, abatement and control of new or existing water pollution, to provide effective means for the carrying out and enforcement of such program, and to provide for co-operation with agencies of other states and the federal government in carrying out these objectives.
- (b) It is not the intention of this act that wastes shall be treated to a purer condition than the natural condition of the receiving stream, provided that any municipal or industrial pollution upstream be not considered as natural.
- (c) It is hereby declared to be the intention of this act to effectuate the control of pollution as herein defined only.

History: En. Sec. 2, Ch. 142, L. 1955.

69-1328. Definitions. For the purpose of this act, the following words and phrases shall have the meanings ascribed to them in this section:

- (a) "Sewage" means the water-carried waste products from the residences, public buildings, institutions or other buildings, including the excrementitious or other discharge from the bodies of human beings or animals, together with such ground water infiltration and surface water as may be present. The provisions of this act shall not apply to the excrementitious discharges of domestic and farm animals providing human health is not involved.
- (b) "Industrial waste" means any liquid, gaseous or solid waste substances resulting from any process of industry, manufacturing, trade or business or from the development of any natural resource, together with such sewage as may be present, which may pollute the waters of the state.
- (c) "Other wastes" means garbage, municipal refuse, decayed wood, sawdust, shavings, bark, lime, sand, ashes, offal, night soil, oil, tar, chemicals and all other substances which may pollute the waters of the state.
- (d) "Contamination" means an impairment of the qualities of the waters of the state by sewage or industrial wastes to a degree which creates a hazard to human health.
- "Pollution" as used in this act shall mean the alteration of the physical, chemical or biological properties of any waters of the state which renders said waters harmful or detrimental for their most beneficial uses and over which the authority of the state board of health as vested by Title 69, Chapter 13 of the Revised Codes of Montana, 1947, as herein amended, does not extend, except that no waters not now being used for human consumption as a single public supply system serving more than one hundred (100) persons shall be classified other than for industrial waste use where the same have been primarily and continuously devoted to industrial waste use except for seasonal variations for a period of over thirty (30) years. Provided, however, that new industry or sewerage system discharging industrial or other wastes into waters excepted by paragraphs (e) and (i) from the provisions of this act shall be required to maintain the classification established by the council at the point of discharge and downstream on such waters. Where waters have been classified or standards established pursuant to this act, any discharge which is not in accord with such classification or standards shall be deemed to be pollution.

Where waters have been classified or standards established pursuant to this act, any discharge which is not in accord with such classification or standards shall be deemed to be pollution.

- (f) "Sewerage system" means pipelines or conduits, pumping stations, and force mains, and all other construction, devices, and appliances appurtenant thereto, used for collecting or conducting sewage or industrial waste or other wastes to a point of ultimate disposal.
- (g) "Treatment works" means any plant, disposal field, lagoon, dam, pumping station, incinerator, or other words not specifically mentioned herein, installed for the purpose of treating, stabilizing or holding sewage, industrial waste, or other wastes.
- (h) "Disposal system" means a system for disposing of sewage, industrial waste or other wastes, and includes sewerage systems and treatment works.

- (i) "Waters of the state" means all streams and lakes, including all rivers and lakes bordering on the state, wells, springs, irrigation systems, marshes, watercourses, waterways, drainage systems and other bodies of water, surface and underground, natural or artificial, publicly or privately owned. Provided, however, that unless drainage or seepage from artificial, privately owned bodies of water reaches flowing streams of the state in such condition as to pollute such flowing waters, the provisions of this act shall not apply to artificial, privately owned waters; and provided further, the provisions of this act shall not apply to any waters of the state not reasonably suitable for domestic or public water supply for human consumption at the time of the passage of this act.
- (j) "Person" means the state or any instrumentality thereof, any municipality, political subdivision, institution, public or private corporation, partnership, individual, or other entity.

History: En. Sec. 3, Ch. 142, L. 1955; amd. Sec. 1, Ch. 151, L. 1959.

- 69-1329. Administration. (a) The state board of health, hereinafter referred to as "the board" shall under the supervision of the council as hereinafter described, have the responsibility for the administration of this act. Subject to the general supervision of said council, the executive officer of the board shall administer the provisions of the act in accordance with said council's rules, regulations, orders, standards of water quality and classifications of the waters of the state. The executive officer of the board may delegate to any employee of the board such of his functions and duties as he deems necessary for the proper and efficient administration of this act, except as provided in (b) below.
- (b) There is hereby created a state water pollution council, hereinafter referred to as the "council." The council shall consist of seven (7) members as follows:

The executive officer of the state board of health; the state fish and game warden (director, state fish and game department); the state engineer; and four (4) members to be appointed by the governor as follows: A representative of industry concerned with the disposal of inorganic waste within the state, for an initial term of one (1) year, thereafter for a term of four (4) years; a representative of industry concerned with the disposal of organic waste within the state for an initial term of two (2) years, thereafter for a term of four (4) years; a representative of agriculture within the state for an initial term of three (3) years, thereafter for a term of four (4) years; a representative of municipal government within the state for a term of four (4) years. The chairman shall be elected from among their number.

No additional compensation shall be allowed any members of the council for services rendered who are employed by the state government. The four (4) members appointed by the governor to serve on the council shall each be paid in addition to actual travel expenses, ten dollars (\$10.00) per day for each day of actual services in the performance of their duties, and all members of the council shall be reimbursed for travel and other necessary expenses incurred in their official duties as members of the coun-

cil. All expenses of members who are otherwise in the employ of the state government shall be paid from the appropriation to their respective agencies. The expenses and per diem of the members who are appointed by the governor shall be paid from funds available to the state board of health.

The council shall hold at least two (2) regular meetings each calendar year and shall keep a record of its proceedings which shall be open to the public for inspection. Special meetings may be called by the chairman and must be called by him upon receipt of a written request signed by two (2) or more members of the council. Written notice of the time and place for all meetings shall be mailed in advance to the office of each member of the council and the secretary. A majority of the members of the council shall constitute a quorum.

Each member of the council may, by order filed with the secretary of the council, designate a deputy or alternate to perform the duties of the member making the designation. Such persons, if any, designated pursuant to this action, shall have the powers and be subject to the duties and responsibilities of the member designating him.

(c) The secretary of the council shall be a member of the public health engineering staff of the state board of health, designated by the executive officer of the board. The secretary shall keep all records of meetings of and actions taken by the council. He shall keep the council advised as to actions taken by persons in response to recommendations and orders issued under authority of this act and shall perform other duties as determined upon by the council, not inconsistent with rules, regulations, and policies adopted by authority of this act or specific authority otherwise given the council.

History: En. Sec. 4, Ch. 142, L. 1955.

69-1330. Powers and duties of the council. The council is herewith authorized and directed:

- (a) To study, investigate, or cause to be studied and investigated, and from time to time, determine ways and means of eliminating from the streams and waters of the state, so far as practical, all substances and materials which pollute the same, and to determine methods, so far as practical, of preventing pollution that is detrimental to the public health or the health of animals, fish, or aquatic life, or the industrial development of the state, or detrimental to the practical use of waters for recreational purposes, agricultural or industrial purposes, or obnoxious, nauseous or toxic for domestic purposes;
- (b) To devise, formulate and adopt rules, regulations and methods of procedure for transmittal to the board for their guidance in the administration of this act;
- (c) To develop and adopt a comprehensive program for the prevention, control and abatement of pollution of the waters of the state and from time to time review and modify such program for the guidance of the board;
- (d) To recommend and encourage studies, investigations, research, demonstrations relating to water pollution and causes, prevention, control and abatement thereof as are deemed advisable and necessary and to direct

the board regarding any actions deemed necessary from the results of such studies, investigations, research and demonstrations in order that the board may discharge its functions under this act;

- (e) To formulate the standards of water purity and classification of water according to the most beneficial uses of such water; in formulating such standards and classifications consideration shall be given to the economics of waste treatment and prevention;
- (f) To hold hearings necessary for the proper administration of this act; and to receive complaints and make investigations in relation thereto;
- (g) To exercise all incidental powers necessary to carry out the purposes of this act;
- (h) To utilize, in carrying out its duties, such staff services of the board as the board is able to make available within its budgetary limits.

History: En. Sec. 5, Ch. 142, L. 1955.

Collateral References
Waters and Water Courses 296.

Waters and Water Courses 196. 93 C.J.S. Waters § 45.

- 69-1331. Powers and duties of the board. The board shall have and may exercise the following powers and duties:
- (a) To consider actions of this council as set forth in section 69-1330, providing that the board may modify such actions of the council only in so far as is necessary to protect human health;
- (b) To accept and administer loans and grants from the federal government and from any other source for carrying out any of its functions;
- (c) To issue, modify or revoke orders for the abatement of pollution or to require the adoption of such remedial measure, including the construction of new disposal systems or treatment works or the modifications, extension or alteration of existing systems and works, as it shall be directed by the council;
- (d) To examine and approve or disapprove all plans and specifications for the construction and operation of (1) new sewerage systems, disposal systems and treatment works, (2) extensions, modifications of or additions to new or existing sewerage systems, disposal systems or treatment works, (3) extension and modifications of or additions to factories, manufacturing establishments or business enterprises, the operation of which would cause a substantial increase in waste discharges or otherwise substantially alter the physical, chemical or biological properties of the waters of the state and (4) new outlets for the discharge of sewage, industrial wastes or other wastes into any sewerage system or otherwise into the water of the state subject to the rules and regulations of the council;
- (e) To issue, continue in effect, revoke, modify or deny permits to any person for the collection and discharge of sewage and industrial and other wastes under such conditions as the council may prescribe to achieve the purposes of this act;
- (f) To advise, consult and co-operate with other agencies of the state and other states and federal government and with affected groups, political subdivisions and industries, in the formulation of such comprehensive program;

- (g) To collect and disseminate information relating to water pollution and the prevention, control and abatement thereof;
- (h) To conduct as it deems necessary, studies, investigations, research and demonstrations relating to water pollution and the causes, prevention, control and abatement thereof.

History: En. Sec. 6, Ch. 142, L. 1955.

- **69-1332.** Pollution unlawful—permits. (a) It shall be unlawful for any person to cause the pollution, as defined in section 69-1328(e), of any waters of the state.
- (b) It shall be unlawful for any person to construct, install or operate a new sewerage system, disposal system or treatment works, extensions, modifications, or additions to new and existing sewerage systems, disposal systems, or treatment works, extensions, modifications or additions to factories, manufacturing establishments or business enterprises, the operation of which would cause a substantial increase in waste discharges to the waters of the state, or otherwise substantially alter the physical, chemical or biological properties of the waters of the state to make or cause to be made any new outlet for the discharge of sewerage, industrial waste or other wastes into any sewerage system or into the waters of this state without first securing such a permit as the board may by regulations require. The board may require the submission of plans and specifications for approval or disapproval and such other information as it deems relevant in connection with the issuance of such permits.

History: En. Sec. 7, Ch. 142, L. 1955.

69-1333. Inspection and entry. The board, through its duly authorized representatives, shall have the power to enter at reasonable times upon any private or public property for the purpose of inspecting and investigating conditions relating to pollution of any waters of the state.

History: En. Sec. 8, Ch. 142, L. 1955.

69-1334. Classifications and standards. (a) In order to effectuate a comprehensive program for the prevention, abatement and control of pollution in the waters of the state, the council is authorized to group such waters into classes in accordance with their present and future most beneficial uses in the interest of the public and such classification or standards may from time to time be altered or modified. Standards of quality and purity for each such classification of the waters of the state shall be adopted in relation to the most beneficial use and benefit to which the waters are or may in the future be put. Such standards may from time to time be altered or modified.

Before streams are classified or standards established or before such standards are modified or repealed, public hearings by the council shall be held in connection therewith. Notice of public hearing for the consideration, adoption or amendment of the classification of waters and the standards of purity and quality thereof shall specify the water concerning which a classification is sought to be made or for which standards are sought to be adopted and the time, date and place of such hearing. Such notice is

to be published at least once a week for three (3) consecutive weeks in a newspaper of general circulation in the area affected and in addition shall be mailed to such other persons as the council has reason to believe may be affected by such classifications and the settings of such standards.

History: En. Sec. 9, Ch. 142, L. 1955.

69-1335. Hearings and review. (a) Any order issued by the council or board shall become final upon thirty (30) days after notice thereof is given to the person affected by such order unless within such thirty (30) day period such person files a notice of application for rehearing with the council. If such notice is filed the council shall accord the appellant a rehearing. A record or summary of the proceedings of such rehearing shall be filed with the council, together with findings of fact made by the council. In any such rehearing, a representative of the council is authorized to administer oaths, examine witnesses and issue notices of hearings and subpoenas requiring the testimony of witnesses and the production of evidence relevant to matter involved in the rehearing. Witnesses shall receive the same fees and mileage as in civil actions. In case of failure to obey a notice of hearing or subpoena issued under this section the district court for the county where the hearing is held shall have jurisdiction upon application of the council or its representatives to issue an order requiring such person to appear and testify or produce evidence as the case may require and any failure to obey such order of the court may be punished by the district court as contempt thereof.

The council shall affirm, modify or reverse such order and notify the appellant of its action. The action of the council shall become final thirty (30) days after notice of such action is served upon the appellant by registered mail or unless within such time an appeal is taken to the district court as herein provided.

An appeal may be taken from any decision of the council by any person who is or may be adversely affected thereby to the district court of any county wherein any part of such alleged pollution originates or where any other matter or controversy may arise. Within thirty (30) days after receipt of a copy of the order of the council made on rehearing or after service of notice thereof by registered mail, the appellant or his attorney shall serve a notice of appeal on the council through its secretary, provided that during such thirty (30) day period the court may for good cause shown extend the time for notice of appeal for not exceeding an additional sixty (60) days. The notice of appeal shall refer to the action appealed from and shall specify the ground of appeal. The original notice of appeal with proof of service shall be filed by the appellant or his attorney with the clerk of the court within ten (10) days of the service of the notice and thereupon the court shall have jurisdiction of the appeal.

The appellant and the council shall in all cases be deemed the original parties to an appeal. Any person affected may become a party by intervention as in a civil action upon showing cause therefor. The attorney general shall represent the council if requested by the council on all such appeals on behalf of the state, or the council is empowered at its discretion to appoint special counsel for such proceeding. No bond or deposit for cost

shall be required of the state or council upon any such appeal or upon any subsequent appeal to the supreme court or other court proceedings, pertaining to the matter.

The trial of the matter shall be de novo, and upon such trial the court shall determine whether or not the council regularly pursued its authority, or whether or not the orders of the board and the findings of the council ought to be sustained, or whether or not such orders and findings are reasonable under all of the circumstances of the case.

An appeal may be taken from the decision of the district court to the supreme court of Montana in the same manner as is provided in civil cases. Upon the final determination of such judicial proceedings, the council shall enter an order in accordance with such determination.

History: En. Sec. 10, Ch. 142, L. 1955.

Cross-Reference

Application of Montana Rules of Civil Procedure to this section, sec. 93-2711-7.

69-1336. Penalties. Any person who violates any final determination or order of the board or of the council shall be enjoined from continuing such violation.

History: En. Sec. 11, Ch. 142, L. 1955.

69-1337. Compliance. Within thirty (30) days after the date on which order of the board or of the council becomes final or after the date judgment affirming such an order is entered, the person or persons as defined herein upon whom the order has been served shall initiate such steps as may be necessary to comply with it. Provided, however, upon good cause shown the board or the council shall extend said thirty (30) day period for a reasonable period of time.

History: En. Sec. 12, Ch. 142, L. 1955.

69-1338. Injunction. It shall be the duty of the council to bring action for an injunction against any person or persons violating any final order of the board or of the council.

History: En. Sec. 13, Ch. 142, L. 1955.

69-1339. State officers to co-operate with the state water pollution council. The council is hereby authorized to require the assistance, co-operation and services of and the use of the records and files in all the departments and institutions of the state, and all state officers and the governing authorities of all state institutions are hereby directed to co-operate with the council in furthering the purposes of this aet.

History: En. Sec. 14, Ch. 142, L. 1955.

69-1340. Repeal. All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed. The provisions of this act are, however, not to be construed to impair or lessen in any manner the existing powers and duties of the state board of health, except that chapter 184 of the thirty-first legislative assembly is hereby repealed.

History: En. Sec. 15, Ch. 142, L. 1955.

69-1341. Preservation of rights. It is the purpose of this act to provide additional and cumulative remedies to prevent, abate and control the pollution of the waters of the state. Nothing herein contained shall be construed to abridge or alter rights of action or remedies in equity under the common law or statutory law, criminal or civil, nor shall any provisions of this act or any act done by virtue thereof, be construed as estopping the state, or any municipality or person as owners of water rights or otherwise in the exercise of their rights in equity or under the common law or statutory law to suppress nuisances or to abate pollution.

History: En. Sec. 16, Ch. 142, L. 1955.

69-1342. Declaration of state public policy on subdivisions. The legislative assembly has determined that the health and safety of Montana citizens are being endangered by drainage from cesspools, septic tanks, privies, water closets, and other sources of polluting matter by liquid raising to the ground surface creating nuisances and seeping into drinking water supplies obtained from wells, springs, streams, lakes and ponds. It is declared the public policy of this state to extend the present laws controlling water supply and sewage disposal to include individual wells that may be effected [affected] by adjoining sewage disposal and individual sewage systems that may effect [affect] adjoining wells.

History: En. Sec. 1, Ch. 95, L. 1961.

Compiler's Note

The compiler has inserted the bracketed words "affected" and "affect."

69-1343. "Subdivision" defined. The word "subdivision" as used in this act shall mean any tract of land which is hereafter divided into five (5) or more parcels, any parcel of which is less than five (5) acres in size, along an existing or proposed street, highway, easement or right of way for sale, rent or lease, as residential lots or residential building plots which are described by reference to a map or survey of the property or by any other method of description.

History: En. Sec. 2, Ch. 95, L. 1961.

69-1344. Maps and plats subject to filing and sanitary requirements. All such subdivision maps or plats or revisions thereof shall be subject to the filing and sanitary requirements provided in this act and its rules and regulations and no county clerk and recorder shall file nor record nor accept for filing or recording any map or plat showing such subdivision of land in any city, town or county unless it complies with the provisions of this act, except as provided in section 69-1345(a).

History: En. Sec. 3, Ch. 95, L. 1961.

69-1345. Filing of map or plat subject to sanitary restriction—submission to and approval by board of health—removal or modification of restriction. (a) Any such subdivision map or plat or revision thereof filed or recorded by the county clerk and recorder in accordance with other provisions of law may be so filed or recorded without regard to the sanitary requirements provided for in this act and its rules and regulations; pro-

vided, however, that any such map or plat to be so filed or recorded shall first be subject to a sanitary restriction which must be recorded on or attached to the map or plat by the county elerk and recorder; and no building or shelter, the use of which by persons necessitates supplying water, sewage or waste disposal, shall be erected until such restriction has been removed or modified as provided hereafter.

- (b) Any such subdivision map or plat or revision thereof may be submitted to the state board of health at any time prior to or after its filing with the county clerk and recorder for review and approval by the state board of health for the water and sewage facilities proposed for such subdivision in accordance with the provision of this act and its rules and regulations. Upon approval of the state board of health said board shall provide the county clerk and recorder a record of its approval or any conditions thereof for recording on said map or plat or for attachment thereto. When any subdivision map or plat calls for both a public water and public sewage system and the design and construction of such is not complete a restricted approval shall be given and recorded by the state board of health; provided, however, that permanent buildings as described above shall not be constructed in such subdivision until such restriction has been removed or modified as provided hereafter.
- (c) Any such subdivision map or plat or revision thereof filed by the county clerk and recorder subject to a sanitary restriction shall have such restriction removed or modified with such restriction removal or modification being made and recorded by the county clerk and recorder on or attached to said map or plat upon receipt of state board of health notice that (a) the state board of health approves plans and specifications for a public water facility and a public sewage facility under existing law pertaining to such facilities and such facilities are constructed or (b) the subdivision map or plat is approved as provided for under the rules and regulations for subdivisions not providing public water or public sewage systems.

History: En. Sec. 4, Ch. 95, L. 1961.

69-1346. Rules and regulations—scope. The state board of health is hereby empowered, authorized, and directed to make such rules and regulations including the adoption of sanitary standards necessary for the administration and enforcement of this act. Such rules and regulations shall clearly provide the basis for approving subdivision maps or plats for various types of water and sewage facilities, both public and private; and shall be related to the size of the lots, contour of the land, porosity of the soil, ground water level, type and construction of private water and sewage facilities and other factors which may be concerned in the judgment of the state board of health with the proper disposal of sewage and the procurement of safe water for the purpose of protecting the health and preventing disease of persons in or adjacent to the areas covered by this act.

History: En. Sec. 5, Ch. 95, L. 1961.

CHAPTER 14

CONSTRUCTION OF TEMPORARY FLOORS AND SCAFFOLDS

Section 69-1401. Construction of scaffolds.

69-1402. Temporary floors for protection of workmen.

69-1403. Planking above scaffolds.

69-1404. Guarding of stairways, openings, etc.—temporary toilets.

69-1405. Penalty for violation of act—duty of building inspector.

69-1401. (2672) Construction of scaffolds. All scaffolds erected in this state for use in the erection, repair, alteration, or removal of buildings shall be well and safely supported, and sufficient width, and properly secured, so as to insure the safety of persons working thereon or passing thereunder, or by the same, and to prevent the falling thereof, or of any material that may be used, placed, or deposited thereon.

History: En. Sec. 1, Ch. 107, L. 1909; re-en. Sec. 2672, R. C. M. 1921.

69-1402. (2673) Temporary floors for protection of workmen. It shall be the duty of every owner, person, or corporation who shall have the direct and immediate supervision or control of the construction or remodeling of any building having more than three framed floors, whether some or all of said floors are above or below the established street grade, to provide and lay upon the upper side of the joists or girders, or both, of the first floor below the riveters and structural steel setters, a plank floor, which shall be laid to form a good substantial temporary floor for the protection of employees and all persons engaged above or below, or on such temporary floor in such building; provided, however, that where the permanent floor is in place on the floor herein required to be planked, a temporary protective floor shall not be required.

If the floor or permanent floor of the second floor, or of any other floor above the second, or roof, is being placed previous to the permanent floor immediately below the floor which is being arched or planked, a good, substantial temporary floor shall be laid on the joists and girders of the next lower floor. For the purpose of this section, the lowest framed floor in the building shall be considered the first floor.

History: En. Sec. 2, Ch. 107, L. 1909; re-en. Sec. 2673, R. C. M. 1921.

69-1403. (2674) Planking above scaffolds. In buildings more than three stories high, where persons are working on a scaffold or scaffolds on the outside of such buildings, such persons shall be protected by well-secured planking, set over the heads of such persons for the full width of the scaffolding on which they are working, if another story or stories are being raised above such persons during the time they are working on such outside scaffold or scaffolding.

History: En. Sec. 3, Ch. 107, L. 1909; re-en. Sec. 2674, R. C. M. 1921.

69-1404. (2675) Guarding of stairways, openings, etc. — temporary toilets. It shall be the duty of all owners, contractors, builders, or persons

having the direct and immediate control or supervision of any buildings in course of erection, which shall be more than thirty feet high, to see that all stairways, elevator openings, flues, and all other openings in the floors, shall be covered or properly protected; provided, that wherever such building or buildings over three stories high are being erected in any city or town, other than a residence, temporary toilets in or convenient to such building shall be maintained for the convenience of employees.

History: En. Sec. 4, Ch. 107, L. 1909; re-en. Sec. 2675, R. C. M. 1921.

69-1405. (2676) Penalty for violation of act—duty of building inspec-Any person violating any of the provisions of the foregoing sections shall be fined not less than one hundred dollars nor more than two hundred dollars for each offense. It is hereby made the duty of the building inspector, his deputy, or other authorities in any county, city, town, or village in the state, through the county attorney, or any other attorney, in case of failure of such owner, person, or corporation to comply with this act promptly, to take the necessary steps to enforce the provisions of this act.

History: En. Sec. 5, Ch. 107, L. 1909; re-en. Sec. 2676, R. C. M. 1921.

Collateral References

Master and Servant €= 12, 115, 116; Negligence 44, 45.
56 C.J.S. Master and Servant §§ 24, 219,

220; 65 C.J.S. Negligence §§ 81, 82.

CHAPTER 15

BOILER INSPECTION—ENGINEERS LICENSE

Appointment, term and compensation of boiler inspectors. Section 69-1501.

> 69-1502. Qualifications of boiler inspectors.

69-1503. Inspection of boilers.

69-1504. Same—further requirements in making inspection.

Same-material to be used. 69-1505.

69-1506. Examination may be made at any time.

Duty of owner to permit inspection-sealing of firebox-costs and 69-1507. expenses.

Licenses required—penalty for operating without license. 69-1508.

Classification of engineers. 69-1509.

69-1510. Complaints and revocation of license.

Certificate of inspection—penalty for wrongfully issuing certificate 69-1511. of inspection or licenses.

69-1512. Fees for inspection or examination.

69-1513. Re-examination for license.

69-1514. Board to re-examine applicants.

69-1515. Boilers exempted from provisions-duty of owner of traction engine -notice of purchase of boiler.

Certificates must be renewed yearly—disposition of moneys.

69-1517. Operation of boiler or steam engine without license.

69-1518. Sale of secondhand boilers.

69-1501. (2712) Appointment, term and compensation of boiler inspectors. The industrial accident board shall appoint not to exceed four inspectors of boilers and shall prescribe their term of office and fix their compensation.

History: En. Sec. 550, Pol. C. 1895; 1, Ch. 30, L. 1913; amd. Sec. 1, Ch. 12, L. re-en. Sec. 1639, Rev. C. 1907; amd. Sec. 1921; re-en. Sec. 2712, R. C. M. 1921.

Cross-Reference

Appointment of boiler inspectors, sec. 50-902.

Collateral References

Steam 4. 82 C.J.S. Steam § 1.

69-1502. (2713) Qualifications of boiler inspectors. No person is eligible to hold the office of inspector of boilers and steam engines who has not had at least ten years of actual experience in the operation of steam engines, steam boilers, and steam machinery, and who has not held for at least five years immediately preceding his appointment a first-class stationary engineer's license of the state of Montana, or who is directly or indirectly interested in the manufacture or sale of boilers or steam machinery, or any patented article required to be sold relating thereto.

History: En. Sec. 2, p. 102, L. 1889; amd. Sec. 551, Pol. C. 1895; re-en. Sec. 1640, Rev. C. 1907; amd. Sec. 2, Ch. 30, L. 1913; re-en. Sec. 2713, R. C. M. 1921.

References

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

- 69-1503. (2714) Inspection of boilers. (1) The inspector of boilers must inspect all steam boilers and steam generators before the same are used, and all persons who bring into this state any boiler or boilers must notify the boiler inspector stating the number and kind of boilers, where they had heretofore been located, and where they are to be located and operated in this state, and must secure from the boiler inspector a certificate of inspection before said boilers are placed in operation, except in the case of new boilers, which must be inspected within ninety days after they are put in use, and all boilers must be inspected at least once in every year. Any person failing to give notice to the boiler inspector as herein provided, or who operates such boilers without a certificate from the boiler inspector, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars for each offense, or by imprisonment in the county jail for not less than thirty nor more than ninety days, or by both such fine and imprisonment.
- (2) The inspector of boilers must subject all boilers to hydrostatic pressure, which hydrostatic pressure must be thirty-three and one-third per cent greater than the steam pressure allowed on the boilers, providing there are no such leaks on such boilers which prevent the inspector from applying such hydrostatic pressure. And the inspector must satisfy himself by a thorough interior and exterior examination that the boilers are well made and of good and suitable material; that the openings for the passage of water and steam, respectively, and all pipes and tubes exposed to heat, are of the proper dimensions and free from obstructions; that the flues are circular in shape; that the fire line of the furnace is at least two inches below prescribed minimum water line of the boilers; that the arrangements for delivering the feed water is such that the boilers cannot be injured thereby, and that such boilers and the steam connections may be safely employed without danger to life.

History: Ap. p. Sec. 554, Pol. C. 1895; re-en. Sec. 1643, Rev. C. 1907; amd. Sec. 5, Ch. 30, L. 1913; amd. Sec. 1, Ch. 32, L. 1919; re-en. Sec. 2714, R. C. M. 1921.

References

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

69-1504. (2715) Same—further requirements in making inspection. (1) The inspector must also satisfy himself that the safety valves are of suitable dimension, sufficient in number and area, and properly arranged, and that the safety-valve weights are properly adjusted so as to allow no greater pressure in the boilers than the amount prescribed by the inspection certificate; that there are a sufficient number of gauge cocks properly inserted to indicate the amount of water, and suitable gauges that will correctly record the pressure of steam; and adequate and certain provisions for an ample supply of water to feed the boilers at all times, and that suitable means for blowing out are provided, so as to thoroughly remove mud and sediment from all parts of the boilers when they are under pressure of steam, and any renter, user, or owner of a boiler, or any person or persons who tamper with the safety valve to allow the boiler to carry greater pressure than is allowed by the inspection certificate, shall be deemed guilty of a misdemeanor.

In subjecting the boilers to the hydrostatic test, the test applied must exceed the working pressure allowed in the ratio of one hundred to sixty-six and two-thirds, provided the valves and other conditions of piping on the boiler will allow the inspector to make such test. But where there are leaks on the boiler which make it impossible to apply such hydrostatic pressure, or where the water cannot be procured with which to make such test, the inspector may make a hammer test of said boiler and inspect same closely and give to such boiler a rating for steam pressure as its condition will warrant. In all cases the inspector must use judgment in the steam pressure allowed on boilers.

Where a boiler is constructed with lap horizontal seams on boiler. dome, or drum, a factor of four and one-half shall be used in determining the safe working pressure allowed on such boiler. But where the boilers are constructed with butt-strap horizontal seams, a factor of four may be used in determining such safe working pressure. But in any case the inspector may use a higher factor if the conditions are such as to warrant it. If boiler rests on side wall on lugs, or is hung by I-beams, or is in any way set up so that the weight of the boiler is pulling against the horizontal seam of rivets, a factor of five must be used to determine the safe working pressure allowed on boiler. Where the horizontal lap seams of boiler are exposed to the fire, a factor of five must be used to determine the safe working pressure to be allowed on such boiler. On stay bolts, if new, seven thousand five hundred pounds pressure per square inch shall be allowed. If such stay bolts are corroded or defective, the inspector must determine the pressure to be allowed on same. On braces made of solid material, eight thousand pounds pressure per square inch shall be allowed. On welded braces or braces with only one crow-foot, six thousand pounds pressure per square inch shall be allowed. No cast iron shall be used in the construction or reinforcements of any boiler where the pressure allowed on said boiler is more than one hundred pounds per square inch.

History: Ap. p. Sec. 555, Pol. C. 1895; re-en. Sec. 1644, Rev. C. 1907; amd. Sec. 6, Ch. 30, L. 1913; re-en. Sec. 2715, R. C. M. 1921.

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

69-1505. (2716) Same—material to be used. No boiler or steam pipe, nor any of the connections thereto, must be approved which is made in whole or in part of bad material, or is unsafe from any cause. Nothing herein shall be construed to prevent the use of any boiler or steam generator which may not be constructed of riveted iron or steel plates, when the inspector has satisfactory evidence that such boiler or steam generator is equal in strength to and as safe from explosion as boilers of the best quality, constructed of iron or steel plates.

History: En. Sec. 556, Pol. C. 1895; re-en. Sec. 1645, Rev. C. 1907; re-en. Sec. 2716, R. C. M. 1921.

NOTE.—The latter part of the foregoing section as originally enacted is omitted from this code to conform to later enactments.

References

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

69-1506. (2717) Examination may be made at any time. In addition to the annual inspection, it is the duty of the inspectors to examine at proper times, when in their opinion such examination is necessary, all such boilers as shall have become unsafe from any cause, and to notify the owner or the person using such boilers of any defect and what repairs are necessary to render them safe.

History: En. Sec. 557, Pol. C. 1895; re-en. Sec. 1646, Rev. C. 1907; re-en. Sec. 2717, R. C. M. 1921.

References

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

(2718) Duty of owner to permit inspection—sealing of firebox -costs and expenses. It is the duty of the owners or managers of steam boilers to allow the inspector free access to the same. In case the owner or manager of any boiler is notified by the inspector to have said boiler ready for inspection on a day certain, and fails to have such boiler ready for inspection at such time, the inspector shall at once seal up the firebox in such boiler, and such seal must not be removed from the firedoor without a written order from the inspector. Any person tampering with or removing said seal shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for not less than two months nor more than six months, or by both such fine and imprisonment. If the owner or manager of any boiler that has been so sealed desires to have the same inspected before the next regular visit of the inspector to the district where said boiler is situated, he must pay all transportation and hotel expenses of the inspector who makes the inspection, in addition to the inspection fee provided by law. It shall be the duty of the engineer operating any boiler or boilers to assist the inspectors in their examination of the same, and point out any defects known to him in the boilers or machinery under his charge. Any engineer not complying with this section shall have his license revoked or suspended.

History: En. Sec. 558, Pol. C. 1895; re-en. Sec. 1647, Rev. C. 1907; amd. Sec. 7, Ch. 30, L. 1913; re-en. Sec. 2718, R. C. M. 1921.

References

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

69-1508. (2719) Licenses required—penalty for operating without license. No person must be granted a license to operate steam boilers or steam machinery under the provisions of this article, who has not been examined by the inspector and found competent to perform the duties of an engineer, and received from such inspector a written or printed license so to act. Any person who operates any steam boiler or steam engine without first obtaining a license from the inspector is guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars, or by imprisonment in the county jail for not more than sixty days, or by both such fine and imprisonment.

History: En. Sec. 559, Pol. C. 1895; re-en. Sec. 1648, Rev. C. 1907; amd. Sec. 8, Ch. 30, L. 1913; re-en. Sec. 2719, R. C. M. 1921.

Police Regulation

The trade of engineer is a proper subject for police regulation. Johnson v. City of Great Falls, 38 M 369, 374, 99 P 1059.

References

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

Collateral References

Licenses \$30. See generally, 33 Åm. Jur. 321, Licenses.

Unlicensed engineer's right to recover for services. 30 ALR 834; 42 ALR 1226 and 118 ALR 646.

- with the care and management of steam machinery as specified in the preceding section must be divided into four classes, namely, first-class engineers, second-class engineers, third-class engineers, and low-pressure engineers. No license shall be granted to any person to perform the duties of a first-class engineer who has not taken and subscribed an oath that he has had at least three years' experience in the operation of steam boilers and steam machinery, or whose knowledge and experience is not such as to justify the belief that he is competent to take charge of all classes of steam boilers and steam machinery.
- No license must be granted to any person to act as a second-class engineer who has not taken and subscribed an oath that he has had at least two years' experience in the operation of steam boilers and steam engines, and is, on examination, found competent to take charge of all classes of steam boilers and steam machinery not exceeding one hundred horsepower. No license must be granted to any person to act as a third-class engineer who has not served at least one year under a competent engineer, and is found, upon examination, to be sufficiently acquainted with the duties of an engineer to be entrusted with the care of steam boilers, and of steam machinery not exceeding twenty horsepower. All firemen who have charge of steam boilers, as to the regulation of feed-water and fuel, where the boilers are so situated as not at all times to be under the eye of the engineer in charge, are required to pass a third-class engineer's examination and procure the same kind of license. All firemen who operate boilers where over thirty pounds pressure per square inch is allowed must hold at least a third-class license.
- (3) All persons who operate heating boilers or plants, in public buildings where the steam pressure allowed on such boilers is thirty pounds per square inch or less, must procure from an inspector a low-pressure license.

Applicants for this grade of license must have at least six months' previous experience in the care and management of low-pressure boilers, and must be found competent, on examination, to hold such grade of license. Such license shall not entitle the holder thereof to operate steam boilers or steam machinery where the boiler pressure allowed is over thirty pounds to the square inch. Engineers holding third-class or higher class of license may operate boilers in heating plants where thirty pounds pressure or less, per square inch is allowed, without obtaining a low-pressure license. All applicants for license as stationary engineers or firemen must be at least eighteen years of age.

(4) None of the licenses in this section above named shall entitle the holder thereof to operate a traction engine, but all persons who are entrusted with the care and management of traction engines, or boilers on wheels, are required to pass an examination as to their competency to operate such class of machinery and to procure a license to be known as a traction license. Such traction license shall not entitle the holder thereof to operate any other class of steam machinery specified in the preceding section. No license shall be granted to any person to act as a traction engineer who has not had at least six months' experience as fireman on traction engines, and who is not found, upon examination, to be sufficiently acquainted with the duties of a traction engineer to be entrusted with the care of traction engines. Applicants for traction license must be at least eighteen years of age.

History: En. Sec. 3, Ch. 32, L. 1905; re-en. Sec. 1649, Rev. C. 1907; amd. Sec. 9, Ch. 30, L. 1913; amd. Sec. 2, Ch. 32, L. 1919; re-en. Sec. 2720, R. C. M. 1921.

References

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

69-1510. (2721) Complaints and revocation of license. Whenever complaint is made against an engineer holding a license from the inspector that he through negligence, want of skill, or inattention to duty, permitted his boiler to burn or otherwise become in bad condition, or that he has been found intoxicated while on duty, it is the duty of the inspector or assistant inspector to make a thorough investigation of the charge, and upon satisfactory proof of such charge to revoke the license of such engineer.

History: En. Sec. 561, Pol. C. 1895; re-en. Sec. 1650, Rev. C. 1907; amd. Sec. 10, Ch. 30, L. 1913; re-en. Sec. 2721, R. C. M. 1921.

References

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

Collateral References

Licenses ≈38. 53 C.J.S. Licenses § 44.

69-1511. (2722) Certificate of inspection—penalty for wrongfully issuing certificate of inspection or licenses. In making an inspection of the boilers and machinery herein provided for, the inspectors may act jointly or separately, but the inspector or assistant inspector making such inspection must in all cases certify the same under the seal of the boiler inspector's office. Any inspector or assistant inspector who willfully and feloniously certifies regarding any steam boilers or their attachments, or grants a

license to any person to act as engineer contrary to the provisions of this article, is punishable under the provisions of section 94-35-214.

History: En. Sec. 562, Pol. C. 1895; reen. Sec. 1651, Rev. C. 1907; amd. Sec. 11, Ch. 30, L. 1913; re-en. Sec. 2722, R. C. M. 1921.

Collateral References

Licenses 40; Steam 4.
53 C.J.S. Licenses § 166; 82 C.J.S. Steam 13.

References

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

- **69-1512.** (2723) **Fees for inspection or examination.** (1) At the time of inspection, the inspector of boilers shall collect fees for the inspection in accordance with the following schedule:
 - (a) Boilers with pressure under thirty (30) pounds per square inch \$5.00
 - (b) Boilers with pressure from thirty (30) pounds to one hundred (100) pounds per square inch \$7.50
 - (c) Boilers with pressure from one hundred (100) pounds to three hundred (300) pounds per square inch \$10.00
 - (d) Boilers with pressure over three hundred (300) pounds per square inch \$15.00
 - (e) Miniature boilers with pressure not in excess of sixtyfive (65) pounds per square inch \$5.00

In case of the failure of the owner, manager or person in charge of any boiler to pay such fee upon the demand of the inspector, said inspector is authorized to seal the firebox of said boiler, and said seal shall not be removed until said fee is paid and the written order of the inspector authorizing its removal is received by said owner or manager. Any person who tampers with or removes such seal without such written order shall be deemed guilty of a misdemeanor and punished as provided by section 69-1507.

- (2) Whenever, upon request of the owner or operator of any boiler it is necessary for the inspector to make a special trip for the inspection of the boiler, the mileage and per diem allowed by law, in addition to the fees herein prescribed, shall be charged and collected by the inspector at the time such special inspection is made.
- (3) Applicants for engineer's license shall pay fees according to the class of license for which application is made, as specified in the following schedule.

(a)	First class	\$15.00
(b)	Second class	\$10.00
(c)	Third class	\$ 6.00
(d)	Low pressure	\$ 4.00
(e)	Traction	\$ 6.00
(f)	Renewal of license	\$ 2.00
(g)	Replacement of lost certificate	\$ 1.00

In case of the failure of any applicant to pass a successful examination, ninety days must elapse before he can again be examined for license. But the inspector may grant to the applicant a lower grade of license than that applied for upon such examination. All certificates of inspection and engineers' licenses must be displayed in a conspicuous place in the engine room.

History: En. Sec. 4, Ch. 32, L. 1905; re-en. Sec. 1652, Rev. C. 1907; amd. Sec. 12, Ch. 30, L. 1913; amd. Sec. 3, Ch. 32, L. 1919; re-en. Sec. 2723, R. C. M. 1921; amd. Sec. 1, Ch. 54, L. 1959.

References

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

(2724) Re-examination for license. If any person who has applied for a license as a first or second or third-class engineer, under the provisions of this article, and has been rejected, feels aggrieved, he may at any time after the lapse of ten days, and within ninety days after the date of his rejection, by petition in writing set forth the causes of his grievance and demand another examination. Such petition must be addressed to and served upon the inspector, and shall be duly verified by the rejected applicant, and accompanied by the required fee for a second examination. Within two days after receiving such petition and fee, it is the duty of the inspector to notify the applicant in writing that on a day certain, which shall not be less than five nor more than forty days after the date of the service of the petition upon such inspector, he will be ready to grant him another examination. At least two days before the day set for examination the applicant must designate in writing to such inspector the name of an engineer holding a certificate of equal grade with the one applied for, and such engineer may present himself upon the day and at the hour fixed for the re-examination.

History: En. Sec. 564, Pol. C. 1895; reen. Sec. 1653, Rev. C. 1907; re-en. Sec. 2724, R. C. M. 1921.

References

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575

69-1514. (2725) Board to re-examine applicants. Upon the same day. or any day prior to the date set for such examination, the inspector and selected engineer must in writing agree upon, and designate and notify a third disinterested engineer holding a license equal in grade to the license applied for by the rejected applicant, to sit with them. On the day and hour set for such examination all three of such board, that is, the inspector and the engineer selected by the applicant, and the engineer agreed upon by them, must proceed to carefully re-examine such applicant, and fully and fairly test his qualifications and capabilities to receive a license such as he has applied for. After such examination is completed, if a majority of such board decide that such applicant is entitled to the license he has applied for, or any license of any inferior grade, the inspector must without delay issue a certificate accordingly, but if a majority of such board reject the applicant, it is a final rejection, and he must not be granted another examination for the space of ninety days after such last rejection, when he may again apply to the inspector or assistant inspector as provided by section 69-1512, and no person must be granted more than one re-examination before a board under the provisions of this article. One-half of the fee which may have accompanied any rejected applicant's petition for re-examination must be awarded by the inspector to each of the engineers who sit on any such examining board, and in case the applicant is granted

a license, the fee paid when he was first rejected is the fee for the issuing of such license granted by any board. In any case any engineer selected or agreed upon as by this section is provided fails or neglects to appear or serve, another may be selected in his place in the manner herein provided.

History: En. Sec. 565, Pol. C. 1895; re-en. Sec. 1654, Rev. C. 1907; re-en. Sec. 2725, R. C. M. 1921.

Collateral References Licenses© 21 et seq. 53 C.J.S. Licenses § 37.

References

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

- (2726) Boilers exempted from provisions—duty of owner of traction engine-notice of purchase of boiler. (1) Boilers used for heating purposes in private residences, low pressure cast iron sectional boilers carrying not to exceed fifteen pounds steam pressure, and locomotives used on railroads conducting a general business in hauling passengers and freight do not come under the provisions of this article. But locomotives, commonly known as dinkey engines, used in operating logging or mining railroads, or any similar work where such locomotives are owned, leased or operated by any individual, company, or corporation and are used in the business of such individual, company, or corporation, and not for general commercial purposes, shall be classed as traction engines and be subject to inspection as are other traction engines, and the persons operating or firing such dinkey locomotives shall be required to hold traction licenses. Nor are locomotive engineers, save as herein provided, or persons operating any of the engines or boilers herein, exempted from the operation of this article, required to procure license from the inspectors.
- (2) It shall be the duty of the owner and user of any traction engine or boiler on wheels to notify the inspector of the location of such boiler on or before the first day of June of each year. Any owner or user of such traction engine or boiler on wheels who shall fail to notify the inspector as herein provided shall be deemed guilty of a misdemeanor. Any person purchasing any steam boiler whether traction or stationary boiler, shall be entitled to receive from the seller the certificates of inspection issued on such boiler and any person purchasing any steam boiler, whether traction or stationary, not exempted by the provisions of this section, shall, within ten days after such purchase, report the fact of such purchase to the boiler inspector and notify such inspector where he intends to locate or operate said boiler. Any person failing to comply with the provisions of this section shall be deemed guilty of a misdemeanor. All other steam boilers and steam engines, save as herein exempted, come under the provisions of this article and persons operating same are required to hold the proper grade of license.

History: En. Sec. 5, Ch. 32, L. 1905; re-en. Sec. 1655, Rev. C. 1907; amd. Sec. 13, Ch. 30, L. 1913; amd. Sec. 4, Ch. 32, L. 1919; re-en. Sec. 2726, R. C. M. 1921; amd. Sec. 1, Ch. 140, L. 1923.

References State ex rel. Nagle v. Page, 98 M 14,

37 P 2d 575.

69-1516. (2727) Certificates must be renewed yearly—disposition of moneys. All certificates of license to engineers of all classes shall be renewed yearly, except as herein provided. The fee for renewal is two dollars in all cases. Any engineer failing to renew his license as herein

provided, or within at least thirty days thereafter, must forward the fee for the original license of the same grade, before license can be reissued; provided, however, that any engineer whose license expired while such engineer was in the military or naval service of the United States shall have sixty days from the time such engineer is discharged from such military or naval service within which to renew his license at the renewal fee of one dollar.

All moneys collected by virtue of the provisions of this act must be paid into the state treasury once in each month and credited to the industrial administration fund.

History: En. Sec. 6, Ch. 32, L. 1905; re-en. Sec. 1656, Rev. C. 1907; amd. Sec. 14, Ch. 30, L. 1913; amd. Sec. 1, Ch. 54, L. 1919; re-en. Sec. 2727, R. C. M. 1921; amd. Sec. 2, Ch. 54, L. 1959.

Collateral References Licenses \$\infty\$36. 53 C.J.S. Licenses \$ 42.

69-1517. (2728) Operation of boiler or steam engine without license. It is unlawful for any person in this state to operate a stationary boiler or steam engine, or any boiler or steam engine other than railroad locomotives or other engines and boilers exempted by the provisions of section 69-1515, without a license granted under the provisions of this article. The owner, renter, or user of any steam engine or boiler is equally liable for the violation of this section. But in case of accident, sickness, refusal to work, or any unforeseen prevention of the licensed engineer employed by any owner, renter, or user of a steam engine or boiler operated in remote districts, which would retard the work to be performed, the owner, renter, or user may, for the space of fifteen days, employ any person of the age of eighteen years whom he may consider competent to run the engine or boiler, although such person so employed may not be the holder of an engineer's license. The person so employing the unlicensed engineer must immediately notify the inspector or assistant inspector. But no owner, renter, or user of steam machinery shall be allowed to so employ unlicensed engineers for more than fifteen days in any one calendar year. And it shall be unlawful, except as stated in this section, for any person, firm, or corporation to employ any person not duly licensed as an engineer, within the meaning of this act, to run or operate any of the boilers or engines subject to the provisions of this act.

History: En. Sec. 568, Pol. C. 1895; 15, Ch. 30, L. 1913; re-en. Sec. 2728, R. C. re-en. Sec. 1657, Rev. C. 1907; amd. Sec. M. 1921.

69-1518. (2729) Sale of secondhand boilers. Any person, firm, or corporation who sells or offers to sell, or who uses or attempts to use, or who rents to others for use, or who delivers to others for use, or who induces others to use any steam boiler that has theretofore been used, either within or without this state, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars or by imprisonment in the county jail for not longer than six months, or by both such fine and imprisonment; provided, that the provisions of this section shall not apply to boilers or engines exempted by the provisions of section 69-1515, nor does it apply to boilers which have been inspected within one year prior to the commission of the act

complained of, and on which a certificate of inspection has been issued and has not been revoked, nor does it apply to boilers on which a certificate of inspection has been extended as provided in section 69-1503 within the time limit of such extension.

History: En. Sec. 7, Ch. 32, L. 1905; re-en. Sec. 1659, Rev. C. 1907; amd. Sec. 16, Ch. 30, L. 1913; re-en. Sec. 2729, R. C. M. 1921.

References

Johnson v. City of Great Falls, 38 M 369, 374, 99 P 1059.

CHAPTER 16

HOISTING ENGINES—LICENSE OF OPERATORS

Section 69-1601.

Operators of hoisting engines must procure license. Application and fee for license—life, renewal and revocation of 69-1602. license.

69-1603. Scope of license-who need not obtain.

69-1604. First and second-class licenses—qualifications of applicant.

Machinery which licensee deemed qualified to operate.

Renewal of application by rejected candidate.

69-1607. Penalty for operating machinery without license.

(2730) Operators of hoisting engines must procure license. It shall be unlawful for any person to operate an electric hoisting engine, or any air hoisting engine, or any hoisting engine operated by gas, oil, or any product of oil, of over five horsepower when used in lowering or hoisting men, except in operating elevators in buildings, or any air compressor operated by any power, without first obtaining a license therefor from a boiler inspector as herein provided. Except that in emergencies the provisions of section 69-1517 relating to the employment of unlicensed engineers shall apply to the operation of the engines and machinery named

History: En. Sec. 1, Ch. 104, L. 1915; amd. Sec. 1, Ch. 31, L. 1919; re-en. Sec. 2730, R. C. M. 1921.

Collateral References

Licenses 14. 53 C.J.S. Licenses § 30. See generally, 33 Am. Jur. 321, Licenses.

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

69-1602. (2731) Application and fee for license—life, renewal and revocation of license. Application for such licenses shall be made to the state boiler inspector in the manner, and the same fee shall be charged therefor and for such license, as now required by law for obtaining a license to operate steam engines and steam boilers, and such license shall be given for a period of one year from the date of issuance thereof, and may be renewed in the same manner provided by law for the renewal of a license to operate steam engines or steam boilers; provided, that the state boiler inspector shall have the right to revoke any license issued under the provisions of this act for any of the reasons for which he could revoke a license to operate steam engines and steam boilers.

History: En. Sec. 2, Ch. 104, L. 1915; re-en. Sec. 2731, R. C. M. 1921.

Collateral References Licenses \$\sim 21, 36, 38. 53 C.J.S. Licenses §§ 37, 42, 44.

(2732) Scope of license—who need not obtain. granted under the provisions of this act shall entitle the holder thereof to operate any of the machinery named in section 69-1601, and the license shall specify on its face such machinery, but no license issued hereunder shall authorize or qualify the person to whom issued to operate a steam boiler or steam engine. Any person holding a license as a first-class engineer, authorizing him to operate steam boilers and steam engines, shall be deemed qualified to operate any of the engines and machinery named in said section 69-1601 without obtaining any license under the provisions thereof. Any person holding a license as a second-class engineer, authorizing him to operate steam boilers and steam engines, shall be deemed qualified to operate any of the engines and machinery mentioned in said section 69-1601, where the same are not over one hundred horsepower capacity, without obtaining any license under the provisions thereof.

History: En. Sec. 3, Ch. 104, L. 1915; amd. Sec. 2, Ch. 31, L. 1919; re-en. Sec. 2732, R. C. M. 1921.

69-1604. (2733) First and second-class licenses—qualifications of applicant. Licenses issued under this act shall be divided into two classes, namely, first class and second class. No person must [shall] be granted a first-class license who has not taken and subscribed an oath that he has had at least three years' experience in the operation of at least one of the engines named in section 69-1601, and whose knowledge of the construction and operation is such as to justify the belief that he is competent to take charge of and operate such machinery. No person must [shall] be granted a second-class license who has not taken and subscribed an oath that he has had at least two years' experience in the operation of at least one of the engines named in section 69-1601, and whose knowledge of the construction and operation is such as to justify the belief that he is competent to take charge of and operate such machinery.

History: En. Sec. 4, Ch. 104, L. 1915; re-en. Sec. 2733, R. C. M. 1921.

Compiler's Note

The bracketed word "shall," in both instances, was inserted by the compiler.

Collateral References

Licenses ≈ 20, 23. 53 C.J.S. Licenses §§ 33, 40.

69-1605. (2734) Machinery which licensee deemed qualified to operate. Any person to whom is granted a first-class license under the provisions of this act shall be deemed qualified to operate any of the machinery or engines named in section 69-1601, without regard to the horsepower thereof. Any person to whom is granted a second-class license under the provisions of this act shall not be permitted to operate any of the machinery named in said section 69-1601 of a greater capacity than one hundred horsepower.

History: En. Sec. 5, Ch. 104, L. 1915; re-en. Sec. 2734, R. C. M. 1921.

69-1606. (2735) Renewal of application by rejected candidate. Any person who has regularly applied for a license under the provisions of this act and has been rejected, may renew his application for such license within the time and in the manner prescribed in sections 69-1513 and 69-1514.

History: En. Sec. 6, Ch. 104, L. 1915; re-en. Sec. 2735, R. C. M. 1921. 69-1607. (2736) Penalty for operating machinery without license. Every person who operates any of the engines and machinery named in section 69-1601 for which a license is required, without first obtaining a license as required by the provisions of this act, and every owner, employer, or manager of any such engines or machinery who knowingly permits any unlicensed person to operate the same, or any person who violates any of the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment.

History: En. Sec. 7, Ch. 104, L. 1915; re-en. Sec. 2736, R. C. M. 1921.

Collateral References Licenses@=41. 53 C.J.S. Licenses § 62.

CHAPTER 17

TRACTION ENGINES—CAPACITY—INSPECTION

Section 69-1701. Computation of capacity of traction engines-marking on engine.

69-1702. Inspection by state boiler inspectors—fees.

69-1703. Penalty for noncompliance with law.

69-1701. (4209) Computation of capacity of traction engines—marking on engine. The capacity or initial power of all traction engines or machinery propelled or operated by gas, oil, or any product of oil, when sold or offered for sale within this state, must be computed and determined by the draw-bar horsepower; that is, the initial pulling power of such engines or machinery, and not otherwise; and such power or capacity shall be plainly engraved in figures with the letters "H. P." on a metallic templet or plate, which templet or plate shall, before such engine or machine is sold or offered for sale, be securely fastened thereto, in such manner and place and of sufficient size as to be easily seen and read. And all new engines or machinery named herein must be engraved or branded with the shop number, which shall be in some place easily observed.

History: En. Sec. 1, Ch. 125, L. 1913; re-en. Sec. 4209, R. C. M. 1921.

69-1702. (4210) Inspection by state boiler inspectors—fees. Any owner or lessee of any of the engines or machinery named in the preceding section shall have the right to call upon the state boiler inspector to inspect and determine the power and capacity of such engine or machinery, and it is the duty of the inspector to make such inspection when so requested. The fee for such inspection shall be five dollars when such engine or machinery is located within any incorporated city or town, and ten dollars when not located within any incorporated city or town, which fees shall be demanded and paid in advance; provided, that the inspector may select and determine the time of such inspection. When such inspection is completed, the inspector shall deliver to the party a certificate, showing the date of inspection, the description of the engine or machinery inspected, which may be by shop number and make, and the draw-bar horsepower thereof; provided, that the provisions of this act shall not apply to automobiles nor to railroad locomotives.

History: En. Sec. 2, Ch. 125, L. 1913; re-en. Sec. 4210, R. C. M. 1921.

69-1703. (4211) Penalty for noncompliance with law. Any person, firm or corporation, or copartnership or agent, who shall sell or offer for sale, or shall authorize or induce any other person to sell or offer for sale any of the engines or machinery named in section 69-1701, without having the same marked or labeled as provided in said section, or who shall misrepresent the capacity or initial horsepower or draw-bar horsepower of such engines or machinery, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than five dollars nor more than five hundred dollars, or imprisoned in the county jail not more than six months, or by both such fine and imprisonment.

History: En. Sec. 3, Ch. 125, L. 1913; re-en. Sec. 4211, R. C. M. 1921.

CHAPTER 18

PUBLIC SAFETY IN CASE OF FIRE—FIRE ESCAPES AND APPARATUS—INSPECTIONS

Section 69-1801. Purpose of act.

Application of act. 69-1802.

69-1803. Fire escape requirements.

69-1804. Specifications for adequate fire escapes.

69-1805. Duty of owner or occupant concerning escapes and alarms.

69-1806. Exterior stairways—corridors—safety requirements.

69-1807. Fire extinguisher requirements.

69-1808. Inspection by fire chiefs-notice of inadequate equipment-compliance-enforcement.

69-1809. Penalty.

69-1810. Injunction—when proper,

69-1801. Purpose of act. The purpose and intent of this act is to provide for the public safety in case of fire in those buildings specified in section 69-1802 open to or used by the public; to provide for fire escapes, fire-fighting apparatus, fire alarms; and to provide for inspection of such buildings and premises by specified officers.

History: En. Sec. 1, Ch. 279, L. 1947.

39 C.J.S. Health §§ 23, 24. 9 Am. Jur. 220, Buildings, §§ 25, 26. Collateral References

Health@32.

Application of act. This act shall apply to hotels, night clubs, boarding or rooming houses, apartments, dormitories, office buildings, theaters, gymnasiums, any place of public amusement or used for public gatherings, colleges, schools, stadiums, amphitheaters, factories, hospitals, motor courts, tourist inns, cabins, asylums, sanitariums, and all other places where large numbers of persons work, sleep, live, or congregate from time to time for any purpose but not to private residences.

History: En. Sec. 2, Ch. 279, L. 1947.

69-1803. Fire escape requirements. All buildings described in section 69-1802, except private residences, of two or more stories in height shall be equipped with not less than one adequate fire escape for each five thousand (5,000) square feet of lot area or fraction thereof occupied by the building. "First story" is defined as being the story the ceiling of which is first above the level of the grade, said ceiling being an average of five (5) feet or more above the ground surrounding the building.

History: En. Sec. 3, Ch. 279, L. 1947; amd. Sec. 1, Ch. 159, L. 1949.

69-1804. Specifications for adequate fire escapes. Adequate fire escapes provided for in the preceding section shall be of interior or exterior type. Exterior fire escapes shall be constructed of concrete stairway, an iron or steel stairway, an iron or steel straight chute, or it may be constructed of other fire-resistive material of equal strength, to which there shall be free, unoccupied and unobstructed passage, and free, unoccupied and unobstructed egress and ingress to and from the interior of the building; provided, however, where outside stairways do not reach the ground, same must have an iron stairway from the lowest balcony to the ground, counterbalanced so that same shall remain in horizontal position when not in use. This stairway must be constructed in the same manner and of the same material as those of the upper balconies. When a suspended weight is used as a counterbalance, proper guides or places must be provided. It is hereby made the duty of the state fire marshal to prepare and promulgate minimum specifications for the construction and erection of each type of fire escape authorized by this act, which specifications shall be based upon a working stress of not less than sixteen thousand (16,000) pounds to the square inch for steel, twelve thousand (12,000) pounds to the square inch for wrought iron, and seven hundred (700) pounds to the square inch for concrete.

Specifications for interior fire escapes shall require that they be enclosed with noncombustible material and that all stairways, halls, air chutes, and laundry chutes and all door and window openings in such interior fire escapes be properly protected with automatic or self-closing fire doors or shutters and that all stairway escapes be continuous and suitably connected with the roof of the building.

No fire escape shall be approved as complying with the provisions of this act, the material and erection of which are not at least the equivalent of the minimum specifications promulgated by the state fire marshal as herein provided.

History: En. Sec. 4, Ch. 279, L. 1947.

69-1805. Duty of owner or occupant concerning escapes and alarms. It shall be the duty of the owner entitled to the beneficial use, rental or control, or if the owner be a nonresident, the occupant or lessee, of any building where fire escapes are required, also to provide and maintain, in good condition at all times, therein, proper guide signs and exit lights, which signs and lights shall be of a sufficient number on each floor to indicate the location of fire escapes and all entrances thereto. And it shall be unlawful to obstruct in any manner whatsoever any fire escape required by the provisions of this act, or hallway, corridor, or entranceway leading thereto. All buildings within the scope of this act occupied at night by more than ten (10) persons, if more than one story in height shall have in each story an electrically operated gong or gongs, to be operated by any one of a number of switches, one of which shall be on each floor. Said gong or gongs shall not be less than six (6) inches in diameter and installed with not less than number fourteen (14) rubber covered wire. Provided, however, that in lieu of said gong or gongs, such buildings may be equipped with a telephone alarm system operated from a central switchboard. Wherever such telephone system is used in such buildings, an attendant shall be on duty at the central switchboard twenty-four (24) hours daily, the alarm from such switchboard shall be simultaneous in all rooms of the building, and a single switch at the switchboard shall operate said telephone alarm system.

History: En. Sec. 5, Ch. 279, L. 1947.

Collateral References

Landlord's liability for injury or death due to defects in fire escapes used in common by tenants, 26 ALR 2d 525.

Liability of landlord to one using fire escape for other than intended purpose. 12 ALR 2d 217.

69-1806. Exterior stairways—corridors—safety requirements. a. Exterior stairways hereinafter installed shall be located on buildings as remote from interior stairways as possible.

b. In all buildings hereafter erected, or occupied at night for sleeping purposes, and which require a fire escape or fire escapes, the public corridors shall extend to all fire escapes.

c. In all buildings erected at the time of the passing of this act not more than one (1) room shall intervene between the corridor and the fire escape. When such a room intervenes said corridor shall have a glass panel extending from the top rail to the door knob and the glass shall be of a kind that is easily broken. Any lock on such corridor door shall be of a night-latch type that can be operated from inside the room without a key. Close to such door in the corridor side shall be kept an adequate instrument for breaking the glass, with an explanatory label, subject to the approval of the local fire chief or the state fire marshal.

History: En. Sec. 6, Ch. 279, L. 1947.

69-1807. Fire extinguisher requirements. All buildings within the scope of this act shall keep on each floor one or more fire extinguishers of a capacity of not less than two and a half $(2\frac{1}{2})$ gallons in good working order; provided, that in lieu of said fire extinguishers such buildings may be equipped on each floor with a hose one and one-half inches $(1\frac{1}{2})$ in diameter in good condition with nozzle attached connected to standpipe with suitable water supply. Such hose shall be of sufficient length to reach all parts of the floor on which it is situated.

Provided, further, that no fire extinguisher or extinguishers containing any of the following liquids: Carbon tetrachloride (CCl₄); Chlorobromomethane (CH₂BrCl); Azeotropic chlormethane (CM-7); Bromochlorodifluoromethane (CBrClF₂); Dibromodifluoromethane (CBr₂F₂); 1, 2-Dibromo-2-chloro-1, 1, 2-trifluoroethane (CBrF₂CBrClf); 1, 2-Dibromo-2, 2-difluoroethane (CH₂BrCBrF₂); Methyl bromide (CH₃Br); Ethylene dibromide (CH₂BrCH₂Br); 1, 2-Dibromotetrafluoroethane (CBrF₂CBrF₂); Hydrogen bromide (HBr); Methylene bromide (CH₂Br₂); Bromodifluoromethane (CHBrF₂); Bromotrifluoromethane (CBrF₃); and Dichlorodifluoromethane (CCl₂F₂), or any other toxic or poisonous vaporizing liquid, shall be kept or maintained in or upon any such building; ninety days (90) after written notice by the state fire marshal or his deputy.

History: En. Sec. 7, Ch. 279, L. 1947; amd. Sec. 1, Ch. 227, L. 1959.

69-1808. Inspection by fire chiefs—notice of inadequate equipment—compliance—enforcement. It shall be the duty of the chief of the fire

department of each city or village where a fire department is established and the mayor of the city or village where no fire department exists or the justice of the peace of a township in territory without the limits of a city or village at least once each six (6) months to enter into all buildings and upon all premises within his jurisdiction for the purpose of the examination of such premises for violations of this act. Such inspection shall include but shall not be limited to testing fire alarms, fire extinguishers, examining fire hose and attachments, and other fire apparatus, and examining fire escapes provided for herein. Copies of such inspection shall be filed in the office of the state fire marshal on forms to be provided by him.

When any building shall be found which required the erection of fire escapes, and upon which fire escapes have not been erected according to the provisions of this act, or if fire hoses, fire extinguishers, fire alarms, or other fire apparatus is found to be lacking or defective or not in good working condition, the person making such inspection or the state fire marshal shall serve a written notice upon the party or parties whose duty it is to erect such fire escapes, or maintain such fire apparatus. Said notice shall specify the time within which said fire escapes shall be erected, or such defective conditions be remedied, and in no case shall be more than ninety days; and said notice shall be deemed to have been served if delivered to the person to be notified, or if left with any adult person at the usual residence or place of business of the person to be notified, or if deposited in the post office, directed to the last known address of the person to be notified. In case of buildings within the term of this act, that are managed and controlled by a board of trustees, board of commissioners, or other governing body, to cause the erection of fire escapes on said buildings, as may be required; provided, that the occupant or lessee of any building who is required to erect fire escapes under the provisions of this act, shall be entitled to reimburse himself for the cost and expense of erecting said fire escapes out of the rent or lease money of said premises, and such reimbursement shall not be construed to be a breach of any existing lease, contract, or any covenant thereof nor grounds for any action or damage ouster.

The state fire marshal shall have general charge and supervision of the enforcement of the provisions of this act and such officers as above enumerated shall act under the general charge and supervision of the state fire marshal. Said officer shall assist the state fire marshal in giving effect to the terms and provisions of this act and shall be subject to his direction and to the rules and regulations adopted for the enforcement of this act.

History: En. Sec. 8, Ch. 279, L. 1947.

69-1809. Penalty. Any person failing, neglecting, or refusing to comply with any of the provisions of this act shall be deemed guilty of a misdemeanor and shall be punished by a fine of not less than fifty dollars (\$50), and each day's failure to comply with any of the provisions of this act, after the expiration of the time stipulated in the written notice provided for herein, shall constitute a separate offense, and it shall be the duty of the state fire marshal or any person authorized to act in his stead, to file complaint for violations of the provisions of this act in any court of com-

petent jurisdiction within the county where said violations occur, and it shall be the duty of the county attorney of such county to forthwith prosecute all such complaints so filed.

History: En. Sec. 10, Ch. 279, L. 1947.

69-1810. Injunction—when proper. In addition to the other remedies and penalties herein provided, upon the failure of any of the parties charged with the duty so to erect fire escapes, or the installation and maintenance of fire alarms or fire extinguishers or other fire apparatus, in accordance with this law, the attorney general of the state, or any county attorney of the county where any such building is located, shall bring action against the owner, lessee, and occupants of any such building for an injunction enjoining the further occupancy of such building until compliance with this act. Such action may be brought in the county where such building is located.

History: En. Sec. 11, Ch. 279, L. 1947.

Definitions.

Section 69-1901.

69-1928. 69-1929.

CHAPTER 19

EXPLOSIVES—REGULATION OF MANUFACTURE, STORAGE AND SALE

69-1902. Prohibitions and exceptions. Quantity and distance table for explosives factories and magazines. 69-1903. 69-1904. Maximum allowed for storage or keeping in building or magazine. 69-1905. Reduction of distances. Containers. 69-1906. 69-1907. Magazines—classes and specifications. 69-1908. Blasting caps, storage of. 69-1909. Certificate of compliance. License. 69-1910. Inspection. 69-1911. 69-1912. Who may enter. 69-1913. Repealed. 69-1914. Firearms not to be discharged, when. 69-1915. Repealed. 69-1916. Possession of shells or bombs for unlawful use. 69-1917. Effect of unconstitutionality of act. 69-1918. Exemptions. 69-1919. Existing ordinances not affected.
69-1920. Explosives, misrepresentations concerning percentage of nitroglycer-69-1919. 69-1921. Regulating sales of explosives. 69-1922. Storage of explosives in mines. 69-1923. Storage of explosives in cities, etc. 69-1924. Construction and location of magazines. 69-1925. Magazines, etc., to bear warning signs. 69-1926. Transportation of explosives with passengers forbidden, when. 69-1927. Careless use of explosives a misdemeanor.

69-1930. Storage of kerosene, petroleum or caps in unincorporated towns or villages—disposal of materials after dark by artificial light, regulation of.

69-1901. (2786) Definitions. The term "explosive" or "explosives" whenever used in this act shall be held to mean and include any chamical

Penalty when death caused by violation of this act.

or by detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructive effects on contiguous objects, or of destroying life or limb.

The word "magazine" as used herein means any building or other structure, other than a factory building, used for the storage of explosives.

The term "building" or "buildings" as used herein shall be held to mean and include only a building or buildings occupied in whole or in part as a habitation for human beings, or any church, schoolhouse, railroad station, store, or other building where people are accustomed to assemble.

The term "factory building" as used herein shall be held to mean any building or other structure containing explosives in which the manufacture of explosives or any part of the manufacture is carried on.

The term "railroad" as used herein shall be held to mean and include any steam, electric or other railroad which carries passengers for hire.

The term "highway" as used herein shall be held to mean and include any public street, public alley or public road.

The term "efficient artificial barricade" as used herein shall be held to mean an artificial mound or properly riveted wall of earth of a minimum thickness of not less than three feet.

The term "person" as used herein shall be held to mean and include firms and corporations, as well as natural persons.

Words used in the singular number shall include the plural, and the plural the singular.

History: En. Sec. 1, Ch. 129, L. 1917; re-en. Sec. 2786, R. C. M. 1921.

Crude Oil Not within Prohibition

This section regulating the manufacture, sale, etc., of explosives has no application to gasoline or other products of crude oil, as against the contention that under it the erection of an oil refinery within a residential district of a city is prohibited. Purcell v. Davis, 100 M 480, 495, 50 P 2d 255.

References

Cashin v. Northern Pacific Ry. Co., 96 M 92, 28 P 2d 862.

Collateral References

Explosives \$\iii 3. 35 C.J.S. Explosives § 3.

22 Am. Jur. 126, Explosions and Explosives, § 2.

(2787) Prohibitions and exceptions. No person shall manufacture, have, keep, or store explosives in this state, except in compliance with this act, except that explosives may be manufactured without compliance with this act in the laboratories of schools, colleges and similar institutions, for the purpose of investigation and instruction.

It shall be unlawful to sell, give away, or otherwise dispose of, or deliver to any person under eighteen (18) years of age any explosives, whether said person is acting for himself or for any other person.

History: En. Sec. 2, Ch. 129, L. 1917; re-en. Sec. 2787, R. C. M. 1921.

Collateral References

Liability for injury by explosive found by, or left accessible to, a child. 10 ALR 2d 22.

Contributory negligence as a defense to a cause of action based upon violation of statute relating to explosives or volatile oils. 10 ALR 2d 853.

Negligence of building or construction contractor in connection with explosives as ground of liability upon his part for injury or damage to third person occurring after completion and acceptance of the work. 13 ALR 2d 250 and 58 ALR 2d 890.

69-1903. (2788) Quantity and distance table for explosives factories and magazines. All factory buildings and magazines in which explosives are had, kept, or stored, must be located at distances from buildings, railroads and highways in conformity with the following quantity and distance table, and this table shall be the basis on which applications for certificate of compliance, as provided in section 69-1909, shall be made and the certificate of compliance issued; provided that the quantity and distance table may be disregarded and a certificate of compliance may be issued for two second-class magazines (see section 69-1907) in any building not otherwise prohibited by law, if the contents and location of the magazine are as follows: (a) One second-class magazine containing not more than fifty pounds of explosives may be allowed if the said second-class magazine is placed on wheels and located not more than ten feet from, on the same floor with and directly opposite to the entrance on the floor nearest the street level; (b) One second-class magazine containing not more than five thousand blasting caps may be allowed if the said second-class magazine is placed on wheels and located on the floor nearest the street level.

The quantity and distance table governing the manufacture, keeping, and storage of explosives is as follows:

QUANTITY AND DISTANCE TABLE

Column One				Column Two	Column Three	Column Four
Quantity that may be had, kept or stored				Distar Nearest	Distance Nearest R	Distan Nearest
Blasting and Electric Blasting Caps		Other Explosives		Distance from Nearest Building	Distance from Nearest Railway	Distance from earest Highway
Number Over	Number Not Over	Pounds Over	Pounds Not Over	Feet	Feet	Feet
1,000	5,000			30	20	10
5,000	10,000			60	40	20
10,000	20,000			120	70	35
20,000	25,000		- 50	145	90	45
25,000	50,000	50	100	240	140	70
50,000	100,000	100	200	360	220	110
100,000	150,000	200	300	520	310	150
150,000	200,000	300	400	640	380	190
200,000	250,000	400	500	720	430	220
250,000	300,000	500	600	800	480	240
300,000	350,000	600	700	860	520	260
350,000	400,000	700	800	920	550	280
400,000	450,000	. 800	900	980	590	300
450,000	500,000	900	1,000	1,020	610	310
500,000	750,000	1,000	1,500	1,060	640	320
750,000	1,000,000	1,500	2,000	1,200	720	360

QUANTITY AND DISTANCE TABLE—(Continued)

Column One Quantity that may be had, kept or stored					Column Three	Column Four
					Distan Nearest	Distan Nearest
Blasting and Electric Blasting Caps		Other Explosives		Distance from Nearest Building	Distance from Nearest Railway	Distance from Nearest Highway
Number Over	Number Not Over	Pounds Over	Pounds Not Over	Feet	Feet	Feet
1,000,000 1,500,000 2,000,000 2,500,000 3,000,000 4,000,000 4,500,000 7,500,000 10,000,000 12,500,000 17,500,000	1,500,000 2,000,000 2,500,000 3,000,000 3,500,000 4,000,000 5,000,000 7,500,000 10,000,000 12,500,000 17,500,000 20,000,000	2,000 3,000 4,000 5,000 6,000 7,000 8,000 9,000 10,000 25,000 30,000 45,000 55,000 60,000 65,000 70,000 75,000 80,000 90,000 95,000 100,000 125,000	3,000 4,000 5,000 6,000 7,000 8,000 9,000 10,000 20,000 25,000 30,000 35,000 40,000 45,000 50,000 55,000 60,000 70,000 75,000 80,000 85,000 90,000 95,000 100,000 125,000 150,000	1,300 1,420 1,500 1,560 1,660 1,700 1,740 1,780 1,950 2,110 2,260 2,410 2,550 2,800 2,920 3,030 3,130 3,220 3,310 3,390 3,460 3,520 3,580 3,630 3,670 3,800	780 850 900 940 970 1,000 1,020 1,040 1,070 1,170 1,360 1,450 1,530 1,610 1,680 1,750 1,820 1,880 1,940 1,990 2,040 2,080 2,120 2,150 2,280	390 420 450 470 490 500 510 520 530 580 680 720 760 800 840 910 940 970 1,000 1,020 1,040 1,060 1,080 1,090 1,100
		150,000 175,000 200,000 225,000 250,000 275,000	175,000 200,000 225,000 250,000 275,000 300,000	3,930 4,060 4,190 4,310 4,430 4,550	2,360 2,440 2,520 2,590 2,660 2,730	1,180 1,220 1,260 1,300 1,340 1,380

History: En. Sec. 3, Ch. 129, L. 1917; re-en. Sec. 2788, R. C. M. 1921.

69-1904. (2789) Maximum allowed for storage or keeping in building or magazine. No quantity in excess of three hundred thousand pounds, or in case of blasting caps no number in excess of twenty million caps, shall be had, kept or stored in any factory building or magazine in this state.

History: En. Sec. 4, Ch. 129, L. 1917; re-en. Sec. 2789, R. C. M. 1921.

69-1905. (2790) Reduction of distances. Whenever the building, railroad or highway to be protected is effectually screened from the factory, building or magazine, where explosives are had, kept or stored, either by natural features of the ground or by an efficient artificial barricade of such height that any straight line drawn from the top of any side wall of the factory building or magazine to any part of the building to be protected, will pass through such intervening natural or efficient artificial barricade, and any straight line drawn from the top of any side wall of the factory building or magazine to any point twelve feet above the center of the railroad or highway to be protected will pass through such intervening natural or efficient artificial barricade, the applicable distances given in columns 2, 3 and 4 of the quantity and distance table may be reduced one-half.

History: En. Sec. 5, Ch. 129, L. 1917; re-en. Sec. 2790, R. C. M. 1921.

69-1906. (2791) Containers. Except only at a factory building, and except while being used, no person shall have, keep or store explosives at any place within this state unless such explosives are completely enclosed or encased in tight metallic, wooden or fibre containers, and, except while being transported or used or in the custody of a common carrier awaiting shipment or pending delivery to consignee during the time permitted by federal law, explosives shall be kept and stored in a magazine constructed and operated as provided in the following section, and no person having explosives in his possession or control shall, under any circumstances, permit or allow any grains or particles to be or remain on the outside or about the containers in which such explosives are held. All containers in which explosives are held shall be plainly marked with the name of the explosive contained therein.

History: En. Sec. 6, Ch. 129, L. 1917; re-en. Sec. 2791, R. C. M. 1921.

- **69-1907.** (2792) **Magazines—classes and specifications.** Magazines in which explosives may lawfully be kept or stored shall be of two classes, as follows:
- (a) Magazines of the first class shall consist of those containing explosives exceeding fifty pounds, and shall be constructed of brick, concrete, iron, or wood, covered with iron, and shall have no openings except for ventilation and entrance. The doors of such magazine must at all times be kept closed and locked, except when necessarily open for the purpose of storing or removing explosives therein or therefrom, by persons lawfully entitled to enter the same. Every such magazine shall have sufficient openings for ventilation thereof, which must be screened in such manner as to prevent the entrance of sparks of fire through the same. Upon each

end of such magazine, above the side walls thereof, or upon its barricade, there shall at all times be conspicuously posted a sign with the words "Magazine-Explosives-Dangerous" legibly printed thereon in letters not less than six inches high. No matches or fire of any kind shall at any time be permitted at any such magazine. No package of explosives shall at any time be opened within fifty feet of any magazine, nor shall any explosives be kept therein except in the original containers. Magazines in which more than fifty pounds of explosives are kept and stored must be detached from other structures, and magazines where more than five thousand pounds of explosives are kept and stored must be located at least two hundred feet from any other magazine, and magazines where quantities of explosives over twenty-five thousand pounds are kept and stored must have an increase over two hundred feet of two and two-thirds feet for each one thousand pounds of explosives in excess of twenty-five thousand pounds stored therein; provided, that where magazines are protected one from the other by natural or efficient artificial barricade, the distance above specified may be reduced one-half.

(b) Magazines of the second class shall be made of fire-proof material or wood, covered with sheet iron, and no more than fifty pounds of explosives shall at any time be kept or stored therein, and except when necessarily opened for use by authorized persons, shall at all times be kept securely locked. Upon each magazine there shall at all times be kept conspicuously posted a sign with the words "Magazine—Explosives—Dangerous" legibly printed thereon, and not more than two such magazines shall be had or kept in any building.

History: En. Sec. 7, Ch. 129, L. 1917; re-en. Sec. 2792, R. C. M. 1921.

69-1908. (2793) **Blasting caps, storage of.** No blasting caps, or other detonating or fulminating caps, or detonators, shall be kept or stored in any magazines in which other explosives are kept or stored.

History: En. Sec. 8, Ch. 129, L. 1917; re-en. Sec. 2793, R. C. M. 1921.

- 69-1909. (2794) Certificate of compliance. All persons engaged in keeping or storing explosives on the date when this act takes effect shall within sixty days thereafter, and all persons engaging in keeping or storing explosives after this act takes effect shall, before engaging in the keeping or storing of explosives, make a report in writing, subscribed to by such persons, or his agent, to the state fire marshal stating:
- (1) The location of the magazine, if then existing or in case of a new magazine, the proposed location of such magazine.
- (2) The kind of explosives that are kept or stored or intended to be kept or stored, and the maximum quantity that is intended to be kept or stored thereat.
- (3) The distance that such magazine is located or intended to be located from the nearest buildings, railroads, and highways.

The state fire marshal shall, as soon as may be after receiving such report cause an inspection to be made of the magazine, if then constructed,

and in the case of a new magazine as soon as may be after same is found to be constructed in accordance with the specifications provided in section 69-1907, the state fire marshal shall determine the amount of explosives that may be kept and stored in such magazine by reference to the quantity and distance table set forth in section 69-1903, and shall issue a certificate to the person applying therefor, showing compliance with the provisions of this act, which certificate shall set forth the maximum quantity of explosives that may be had, kept or stored in said magazine. Such certificate of compliance shall be valid until canceled for one or more of the causes hereinafter provided. Whenever by reason of change in the physical condition surrounding said magazine at the time of the issuance of the certificate of compliance therefor, such as

- (a) The erection of buildings nearer said magazine,
- (b) The construction of railroads nearer said magazine, or
- (c) The opening for public travel of highways nearer said magazine, then the amounts of explosives which may be lawfully had, kept or stored in said factory or magazine must be reduced to conform to such changed conditions in accordance with the quantity and distance table notwithstanding the certificate of compliance, and the state fire marshal shall modify or cancel such certificate in accordance with the changed conditions. Whenever any person to whom a certificate of compliance has been issued, keeps or stores in the magazine covered by such certificate of compliance, any quantity of explosives in excess of the maximum amount set forth in said certificate of compliance, or whenever any person fails for thirty days to pay the annual license fee hereinafter provided after the same becomes due, the state fire marshal is authorized to cancel such certificate of compliance. Whenever a certificate of compliance is canceled by the state fire marshal for any cause hereinbefore specified, the state fire marshal shall notify the person to whom such certificate of compliance is issued of the fact of such cancellation and shall in said notice direct the removal of all explosives stored in said magazine within ten days from the giving of said notice. Failure to remove the explosives stored in said magazine within the time specified in said notice shall constitute a violation of this act.

History: En. Sec. 9, Ch. 129, L. 1917; re-en. Sec. 2794, R. C. M. 1921.

69-1910. (2795) License. Every person engaging in the keeping or storing of explosives shall pay an annual license fee for each magazine maintained, to be graduated by the state fire marshal according to the quantity kept or stored therein, of not less than one dollar nor more than twenty-five dollars. Said license fee shall be payable in advance to the state fire marshal and by him paid to the state treasurer.

History: En. Sec. 10, Ch. 129, L. 1917; re-en. Sec. 2795, R. C. M. 1921.

69-1911. (2796) **Inspection.** The state fire marshal shall make, or cause to be made, at least one inspection during every year, of each licensed factory or magazine.

History: En. Sec. 11, Ch. 129, L. 1917; re-en. Sec. 2796, R. C. M. 1921.

69-1912. (2797) **Who may enter.** No person, except an official as authorized herein or a person authorized to do so by the owner thereof, or his agent, shall enter any factory, building, magazine, or car containing explosives in this state.

History: En. Sec. 12, Ch. 129, L. 1917; re-en. Sec. 2797, R. C. M. 1921.

69-1913. (2798) Repealed—Chapter 263, Laws of 1955.

Repeal

This section (Sec. 13, Ch. 129, L. 1917), relating to vehicles transporting ex-

plosives, was repealed by Sec. 158, Ch. 263, Laws 1955, effective July 1, 1955. See sec. 32-21-153 for new regulations.

69-1914. (2799) Firearms not to be discharged, when. No person shall discharge any firearms at or against any magazine or factory building.

History: En. Sec. 14, Ch. 129, L. 1917; re-en. Sec. 2799, R. C. M. 1921.

Collateral References

Explosives 3; Weapons 15. 35 C.J.S. Explosives § 3; 94 C.J.S. Weapons § 19.

69-1915. (2800) Repealed—Chapter 263, Laws of 1955.

Repeal act, was repealed by Sec. 158, Ch. 263, This section (Sec. 15, Ch. 129, L. 1917), Laws 1955, effective July 1, 1955. providing a penalty for violations of the

69-1916. (2801) Possession of shells or bombs for unlawful use. Any person who shall have in his possession or control any shell, bomb or similar device, charged or filled with one or more explosives, intending to use the same or cause the same to be used for an unlawful purpose, shall be deemed guilty of a felony, and upon conviction, shall be punished by imprisonment in a state prison for a term of not less than five years nor more than twenty-five years. The possession or control by any person, of any such device, so charged or filled, shall be deemed prima-facie evidence of an intent to use the same, or cause the same to be used for an unlawful purpose.

History: En. Sec. 16, Ch. 129, L. 1917; re-en. Sec. 2801, R. C. M. 1921.

69-1917. (2802) Effect of unconstitutionality of act. In case any provision of this act shall be adjudged unconstitutional, or void for any other reason, such adjudication shall not affect any of the other provisions of this act.

History: En. Sec. 17, Ch. 129, L. 1917; re-en. Sec. 2802, R. C. M. 1921.

69-1918. (2803) Exemptions. Nothing contained in this act shall apply to the regular military or naval forces of the United States, nor the duly authorized militia of any state or territory thereof, nor to the police or fire departments of this state, or of any municipality or county within this state, providing the same are acting in their official capacity, and in the proper performance of their duties.

Nothing contained in this act shall apply to explosives while being transported upon vessels or railroad cars in conformity with the regulations adopted by the interstate commerce commission; nor to transporta-

tion or use of blasting explosives for agricultural or prospecting purposes in quantity not exceeding two hundred pounds at any one time; nor to any explosives in quantities not exceeding five pounds at any one time; nor to any person or persons carrying ammunition in reasonable amounts.

History: En. Sec. 18, Ch. 129, L. 1917; re-en. Sec. 2803, R. C. M. 1921.

69-1919. (2804) Existing ordinances not affected. Nothing contained in this act shall affect any existing ordinance, rule or regulation of any city or municipality not less restrictive than this act governing the manufacture, storage, and sale of explosives, or affect, modify, or limit the power of cities or municipalities in this state to make ordinances, rules, or regulations not less restrictive than this act, governing the manufacture, storage, sale, use, or transportation of explosives within their respective corporate limits.

History: En. Sec. 19, Ch. 129, L. 1917; re-en. Sec. 2804, R. C. M. 1921.

69-1920. (2805) Explosives, misrepresentations concerning percentage of nitroglycerine. Any person or corporation engaged in the business of selling blasting or giant powder by whatever name the same shall be known containing nitroglycerine, or equivalent explosive compound in any form, who shall sell or vend any such blasting powder upon the representation that the same contains a certain percentage or proportion of nitroglycerine, or equivalent explosive compound, or who being applied to for blasting powder containing a certain percentage or proportion of nitroglycerine or equivalent explosive compound shall sell or deliver any such blasting powder, containing a less percentage or proportion of nitroglycerine, or equivalent explosive compound, than represented or than such powder as was applied for, shall be deemed guilty of a misdemeanor and, on conviction, shall be punished by a fine of not more than one thousand dollars nor less than one hundred dollars.

History: En. Sec. 1, Ch. 124, L. 1909; re-en. Sec. 2805, R. C. M. 1921.

69-1921. (2806) Regulating sales of explosives. That every person, company or corporation, manufacturing, storing, selling, transferring, dealing in, or in any manner disposing of any powder, gunpowder, giant or Hercules powder, giant caps, or other highly explosive substances, shall keep in a book for that purpose an accurate record of all transactions, with the date thereof, relating to the receiving and disposing of the same, which record shall show the amount of each such explosive received, by whom transported or conveyed, and each and every sale or other disposition made of such explosive, with the amount thereof, and the name of the person to whom delivery of the same was made, who shall be required to receipt therefor. Such record shall at all times be open to the inspection of the state inspector of mines, or any peace officer.

History: En. Sec. 707, Pen. C. 1895; re-en. Sec. 8545, Rev. C. 1907; re-en. Sec. 2806, R. C. M. 1921.

Penalty

The penalty provided in section 69-1928, applies to certain acts declared unlawful under the provisions of sections 69-1921 to 69-1926. State v. Williams, 106 M 516, 523, 79 P 2d 314.

69-1922. (2807) Storage of explosives in mines. No person, company or corporation shall store, deposit or keep in any mine a greater quantity than three thousand pounds of blasting powder, giant or Hercules powder, or other highly explosive substance, and no explosives named in this section shall be stored, deposited, or kept in any place where its accidental explosion would cut off the escape of miners working in said mine.

History: En. Sec. 708, Pen. C. 1895; re-en. Sec. 8546, Rev. C. 1907; re-en. Sec. 2807, R. C. M. 1921.

Negligence Per Se

An allegation of negligence in storing dynamite in a mine, in a quantity greater than three thousand pounds, or in storing that or any other explosive in a mine where, should an explosion accidentally take place, escape by those working in the mine would be cut off, charges the violation of a specific duty imposed by this section, and such a violation is negligence per se. Westlake v. Keating Gold Mining Co., 48 M 120, 128, 136 P 38.

Mining Co., 48 M 120, 128, 136 P 38.

Plaintiff who, at the time of the explosion of a quantity of dynamite stored at a place in a mine contrary to the provisions of this section, was not so situated as to have his escape from the mine cut

off by it, could not charge as an act of negligence the storage of the powder in a place where, in case of accidental discharge, escape by those working in the mine would be cut off, since the causal connection between his injuries and the stoppage of egress from the mine would be lacking. Westlake v. Keating Gold Mining Co., 48 M 120, 136 P 38.

Penalty

The penalty provided in section 69-1928 applies to certain acts declared unlawful under the provisions of sections 69-1921 to 69-1926. State v. Williams, 106 M 516, 523, 79 P 2d 314.

Collateral References

Liability for property damage by concussion from blasting. 20 ALR 2d 1372.

69-1923. (2808) Storage of explosives in cities, etc. No person, company, or corporation shall store, deposit, or keep within one mile of the limits of any city, town, or village any powder, gunpowder, giant or Hercules powder, or other highly explosive substance, in greater quantities than one hundred pounds, or more than one thousand giant caps, at any one time, nor shall such explosives be stored, deposited or kept in any quantities whatever within one mile of such city, town, or village, except in a magazine constructed as hereinafter described; provided, that this section shall not be construed to prevent any person, company or corporation, operating a mine within one mile of the limits of such city, town, or village, from storing powder for use in such mine in the manner prescribed in sections 69-1922 and 69-1924; provided also, that this section shall not prevent the keeping of a reasonable amount of gunpowder, not exceeding fifty pounds, in a safe place for sale.

History: En. Sec. 709, Pen. C. 1895; re-en. Sec. 8547, Rev. C. 1907; re-en. Sec. 2808, R. C. M. 1921.

Penalty

The penalty provided in section 69-1928 applies to certain acts declared unlawful under the provisions of sections 69-1921 to 69-1926. State v. Williams, 106 M 516, 523, 79 P 2d 314.

Use of the Term City or Town

An illustration is found in this section and section 69-1924 of the frequent legis-

lative use of the term "city or town" without any definite prefix, but under circumstances which would render it absurd to hold that only incorporated cities and towns are meant. State ex rel. Powers v. Dale, 47 M 227, 230, 131 P 670.

Collateral References

Liability of municipality for injury or damage from explosion or burning of substance stored by third person under municipal permit. 17 ALR 2d 683.

69-1924. (2809) Construction and location of magazines. It shall be unlawful to store, deposit, or keep any powder, gunpowder, giant or Her-

cules powder, giant caps, or other highly explosive substance, in amounts exceeding one hundred pounds, elsewhere than in storehouses or magazines constructed as follows:

The walls of such storehouses and magazines shall be constructed entirely of stone or brick. There shall be no opening in such magazine except necessary ventilation, and one entrance not exceeding thirty inches in width. There shall be two doors to such entrance, an outer door opening outward and an inner door opening inward. The said door shall be of plank not less than two inches in thickness, and both doors shall be entirely covered with one-eighth inch iron, and shall be hinged upon two or more iron hooks securely anchored in the walls of such magazine. Both said doors shall be kept securely locked at all times when powder is stored therein, except when it is necessary to store therein or remove therefrom such powder or other explosives. Such storage room or magazine shall be well and securely roofed with fireproof and bulletproof material. Such magazine shall not be constructed within less than onefourth of a mile of any human habitation except by the permission of the county commissioners, nor shall any magazine constructed within one mile of the limits of any city, town, or village be constructed within one hundred feet of any building owned by any other person.

History: En. Sec. 710, Pen. C. 1895; re-en. Sec. 8548, Rev. C. 1907; re-en. Sec. 2809, R. C. M. 1921.

under the provisions of sections 69-1921 to 69-1926. State v. Williams, 106 M 516, 523, 79 P 2d 314.

Penalty

The penalty provided in section 69-1928 applies to certain acts declared unlawful

References

State ex rel. Powers v. Dale, 47 M 227, 230, 131 P 670.

69-1925. (2810) Magazines, etc., to bear warning signs. Every store-house or magazine constructed as provided in the foregoing section, in which shall be stored, deposited, or kept any powder, gunpowder, giant or Hercules powder, giant caps, or other highly explosive substance, shall at all times have posted above the entrance thereof a signboard on which shall be painted in conspicuous letters not less than four inches in length the words "explosives—dangerous." Every dray, wagon, freight car, or other vehicle in which shall be transported, transferred, or delivered any of the said explosives, shall bear on each side thereof a similar sign with conspicuous letters not less than two inches in length.

History: En. Sec. 711, Pen. C. 1895; re-en. Sec. 8549, Rev. C. 1907; re-en. Sec. 2810, R. C. M. 1921.

Cross-Reference

Regulating transportation of explosives by highway vehicles, sec. 32-21-153.

Penalty

The penalty provided in section 69-1928 applies to certain acts declared unlawful under the provisions of sections 69-1921 to 69-1926. State v. Williams, 106 M 516, 523, 79 P 2d 314.

69-1926. (2811) Transportation of explosives with passengers forbidden, when. It shall be unlawful to knowingly transport or deliver or cause to be delivered giant or Hercules powder, giant caps, nitoglycerine, nitroleum, blasting or nitrated oil, or powder mixed therewith or fibre saturated therewith, or any other highly explosive substance in any quantities whatever on any vessel or vehicle whatever carrying passengers by land or

water between any points within the state of Montana; provided, that on mixed trains intended for service on railroad lines leading to mining localities or camps the aforesaid explosive substances or any of them may be lawfully carried, by hanging a placard on each side of the car or cars carrying the explosives, reading thus: "This car is loaded with powder"—each letter of said placard to be at least two inches long, but this proviso shall not permit the carrying of any of said explosive substances in the same car or coach in which the passengers are carried.

History: En. Sec. 1, p. 246, L. 1897; re-en. Sec. 8550, Rev. C. 1907; re-en. Sec. 2811, R. C. M. 1921. under the provisions of sections 69-1921 to 69-1926. State v. Williams, 106 M 516, 523, 79 P 2d 314.

Penalty

The penalty provided in section 69-1928 applies to certain acts declared unlawful

Collateral References

Carriers 11.
13 C.J.S. Carriers § 15.

69-1927. (2812) Careless use of explosives a misdemeanor. Every person who shall recklessly or maliciously use, handle, or have in his or her possession any blasting powder, giant or Hercules powder, giant caps, or other highly explosive substance, whereby any human being is intimidated, terrified, or endangered, shall be guilty of a misdemeanor.

History: En. Sec. 713, Pen. C. 1895; re-en. Sec. 8551, Rev. C. 1907; re-en. Sec. 2812, R. C. M. 1921.

${\bf Construction} {\bf --Statutes} \ \ {\bf Controlling} \ \ {\bf Punishment}$

Under the rule that where general terms in one part of a statute are inconsistent with more specific or particular provisions in another part, the particular provisions must govern, and should be regarded as exceptions to the general provision, so that both may be given effect, section 69-1928 is a general provision, and sections 69-1927 and 69-1929 are exceptions to it; it follows that the crime denounced by section 69-1927 is a misdemeanor, with punishment controlled by section 94-116, and is not a felony. State v. Williams, 106 M 516, 524, 79 P 2d 314.

Handling of Explosives

Alleged defect in the title to the original act relating to the handling of explosives, of which this section and section 69-1928 were a part, and which act was carried forward in three subsequent codifications of the laws, held cured by the adoption of such codes by the legislature. Cashin v. Northern Pacific Ry. Co., 96 M 92, 113, 28 P 2d 862.

Contention that this section, dealing with reckless handling of blasting powder, by the enactment of Ch. 129, Laws 1917 (69-1901 et seq.), has been repealed by implication, was not meritorious, that chapter not dealing with the subject matter of this section. Cashin v. Northern Pacific

Ry. Co., 96 M 92, 28 P 862.

69-1928. (2813) Penalties. Any person, or association of persons, violating any of the provisions of this act, shall be punished by imprisonment in the penitentiary not exceeding five years, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment.

History: En. Sec. 714, Pen. C. 1895; re-en. Sec. 8552, Rev. C. 1907; re-en. Sec. 2813, R. C. M. 1921.

Construction—General Provision

This section is a general provision, and sections 69-1927 and 69-1929 are to be regarded as exceptions to its general provisions. Both sections are special provisions covering the offenses defined in each. The penalty in this section applies to un-

lawful acts declared in sections 69-1921 to 69-1926. State v. Williams, 106 M 516, 524, 79 P 2d 314.

References

Cashin v. Northern Pacific Ry. Co., 96 M 92, 132, 28 P 2d 862.

Collateral References

Explosives \$4. 35 C.J.S. Explosives § 12.

69-1929. (2814) Penalty when death caused by violation of this act. When the death of any person is caused by the explosion of any powder,

gunpowder, giant or Hercules powder, giant caps, or other highly explosive substance that has been stored, kept, handled, or transported, contrary to the provisions of the foregoing sections, the person or persons who have so unlawfully stored, kept, handled, or transported such explosives, or who may have knowingly or negligently permitted their agents, servants, or employees to so unlawfully store, keep, handle, or transport the same, shall be guilty of manslaughter, and, on conviction, shall be punished by imprisonment in the state penitentiary for a period not exceeding ten years.

History: En. Sec. 715, Pen. C. 1895; re-en. Sec. 8553, Rev. C. 1907; re-en. Sec. 2814, R. C. M. 1921.

Operation and Effect

Section 69-1928 is a general provision relating to violations of sections 69-1921 to 69-1926, but sections 69-1927 and 69-1929 are special and must be regarded as exceptions and they are controlling in determining the gravity of an offense charged under either of them. State v. Williams, 106 M 516, 524, 79 P 2d 314.

Collateral References

Explosives 4; Homicide 62. 35 C.J.S. Explosives § 3; 40 C.J.S. Homicide §§ 59, 60.

69-1930. (2815) Storage of kerosene, petroleum or caps in unincorporated towns or villages—disposal of materials after dark by artificial light, regulation of. No person or persons shall store, or keep in any store, warehouse, or any other building within the limits of any unincorporated town or village, more than five thousand giant caps at any one time, or any coal oil, kerosene or petroleum, exceeding sixty gallons, other than in original packages, within the limits of the said unincorporated town or village, or shall sell, lend, barter or dispose of, deliver or receive the same, or any or either of the said articles or materials, in the section herein enumerated, after dark, by the aid of any lamp, lantern, candle, match, or other artificial light, except electric light.

History: En. Sec. 3, p. 72, L. 1893; 8554, Rev. C. 1907; re-en. Sec. 2815, R. C. re-en. Sec. 716, Pen. C. 1895; re-en. Sec. M. 1921.

CHAPTER 20

MATERNITY HOSPITALS—LICENSE BY STATE BOARD OF HEALTH

Section 69-2001. Maternity hospital defined.

69-2002. License required. 69-2003. Issuance of licenses.

69-2004. Penalty.

69-2001. Maternity hospital defined. Any person who receives for care or treatment during pregnancy or during delivery or within ten (10) days after delivery more than one woman within a period of six (6) months, except women related to him or her by blood or marriage, shall be deemed to maintain a maternity hospital. The word "person," where used in this act, shall include individual, partnership, voluntary association or corporation.

History: En. Sec. 1, Ch. 66, L. 1941,

Collateral References Hospitals \$\infty\$1. 41 C.J.S. Hospitals § 3.

69-2002. License required. No person shall maintain or operate a maternity hospital in this state without first obtaining a license in writing each vear from the state board of health as hereinafter provided.

History: En. Sec. 2. Ch. 66, L. 1941.

69-2003. Issuance of licenses. The state board of health is hereby authorized to issue licenses to persons conducting maternity hospitals and to prescribe the conditions upon which such licenses shall be issued, making such rules and regulations as it may deem advisable for operation and regulation of maternity hospitals, and the state board of health is further authorized, through its duly authorized representative, to inspect every maternity hospital operated or maintained in the state and the person or persons in charge thereof shall give the state board of health and its representative the information required and afford them every reasonable facility for observing the operation of such hospitals.

History: En. Sec. 3, Ch. 66, L. 1941.

Penalty. Any person who maintains or conducts or assists 69-2004. in maintaining or conducting a maternity hospital without first having obtained a license in writing, as provided in section 69-2002, shall be punished upon conviction by imprisonment in the county jail for not more than six (6) months, or by a fine not to exceed five hundred dollars (\$500.00), or both such fine and imprisonment.

History: En. Sec. 4, Ch. 66, L. 1941.

CHAPTER 21

DOORS ON PUBLIC BUILDINGS-REGULATION OF

Section 69-2101. Doors on buildings accommodating the public to open outward. 69-2102. Exits—regulation of. 69-2103. Duty of state fire marshal—notice of violation.

69-2101. Doors on buildings accommodating the public to open outward. Every person who constructs, owns, controls, or has the custody of any building erected, or to be erected, to be used to accommodate public assemblies, including churches, schools, courthouses, theaters, public halls, ballrooms, beer parlors, taverns, roadhouses, night clubs, or any other building of like character, or any building owned or controlled by the state of Montana to be used as an office building, dormitory, school, or for penal or custodial purposes, or any other building of like character, shall have at least two separate exits or as many more as the fire marshal shall direct. These exits shall be placed as remote from each other as consistent with the construction of the building and shall be easily accessible from all parts of the building.

History: En. Sec. 1, Ch. 114, L. 1943.

Collateral References Health 32. 39 C.J.S. Health § 24.

Exits—regulation of. Each exit shall be at least seventy-two (72) inches high and thirty (30) inches wide and the door or doors shall

open outwardly. During the period of occupancy, no exit door shall be locked, bolted, or otherwise fastened so that the door or doors cannot be opened from the inside by the use of the ordinary door knob or by pressure on the door or on a panic-release device. It shall be unlawful to obstruct, in any manner whatsoever, any exit required by the provisions of this act, or any hallway, corridor or entrance way leading thereto. Violation of this section shall constitute a misdemeanor. Provided, however, that this section shall not be construed as requiring doors where persons are confined or imprisoned by authority of law to be or remain unlocked, unbolted, or otherwise fastened so that they can be opened from the inside.

History: En. Sec. 2, Ch. 114, L. 1943.

69-2103. Duty of state fire marshal—notice of violation. It shall be the duty of the state fire marshal, his deputies and subordinates to enter into all buildings and upon all premises described in this act for the purpose of examination of such premises for violations of this act, and when any building shall be found which has not been constructed or maintained according to the provisions of this act, he shall serve or cause to be served a written notice upon the person or persons who own or have under control such building. This notice shall specify the violation and the time given within which such violation shall be remedied. Upon the failure of any of the parties charged with the duty of correcting such violations, in accordance with this act, the state fire marshal shall transmit this information to the attorney general of the state, who shall refer said violation to the county attorney of the county wherein the violation occurs for prosecution, and the attorney general may assist the said county attorney to a determination of the matter. The said attorney general shall instruct the said county attorney to institute an action against the owner, lessee or occupant of such building for an injunction and abatement against the property.

History: En. Sec. 3, Ch. 114, L. 1943.

CHAPTER 22

BLOOD PLASMA—PROCURING AND PROCESSING

Section 69-2201. Authority of state board of health concerning blood and blood plasma. 69-2202. Rules for distribution,

69-2201. Authority of state board of health concerning blood and blood plasma. The state board of health of Montana is hereby authorized and directed to obtain blood from donors in the state of Montana, to purchase equipment necessary for processing such blood, to process the same, and to furnish blood plasma so processed free of charge to the people of the state of Montana, and to provide reserves of blood plasma in various parts of the state.

History: En. Sec. 1, Ch. 20, L. 1945.

69-2202. Rules for distribution. The state board of health of Montana is in authority to establish from time to time rules and regulations covering the distribution and use of such plasma.

History: En. Sec. 2, Ch. 20, L. 1945.

CHAPTER 23

CADAVERS—PROCUREMENT FOR TEACHING ANATOMICAL SCIENCE —AUTOPSIES AND DISSECTIONS

Section 69-2301. Procurement of cadavers by certain institutions and schools authorized.

69-2302. Application—evidence submitted to state board of health.

69-2303. Delivery of cadavers authorized.

69-2304. Expenses.

69-2305. Bodies to be kept three months before use thereof.

69-2306. Burial permit to accompany body-burial.

69-2307. Penalty.

69-2308. Limitation on right to perform autopsy or dissection.

69-2309. Qualifications to perform autopsies or post-mortem examinations—written report.

69-2310. Autopsy performed contrary to law a misdemeanor—persons exempt from law.

69-2301. Procurement of cadavers by certain institutions and schools authorized. Any accredited institution of higher learning in the state of Montana or any accredited hospital school of nursing affiliated therewith, may apply to individuals or organizations who have the custody of unclaimed dead human bodies, for the procurement of unclaimed dead human bodies and these institutions of higher learning may receive such bodies for use in the teaching and demonstration of anatomical science by professional instructors.

History: En. Sec. 1, Ch. 102, L. 1943.

Collateral References
Dead Bodies 21.
25 C.J.S. Dead Bodies 2.

69-2302. Application—evidence submitted to state board of health. The administrative authorities of an institution of higher learning, or hospital school of nursing affiliated therewith, on or before the time when application is made for the procurement of unclaimed dead human bodies, shall provide evidence in the form of a notarized statement to the state board of health of the state of Montana showing that proper equipment, including tanks and/or refrigeration equipment, of a type, and so constructed as to make this equipment satisfactory for the proper handling and preservation of dead human bodies and this equipment for the storage of dead human bodies shall be so constructed that after the bodies are placed in them the containers may be kept closed by means of at least two locks of brass or other like metallic substance of paracentric construction and this equipment may be inspected at such times as may be determined by the state board of health of the state of Montana.

History: En. Sec. 2, Ch. 102, L. 1943.

69-2303. Delivery of cadavers authorized. The state board of examiners of the state of Montana or others who may have the custody of unclaimed dead human bodies are hereby authorized to permit the delivery to any institution of higher learning in the state of Montana or any accredited school of nursing affiliated therewith, any unclaimed body, after such institution has complied with the provision of section 69-2302, provided that there was no request by the deceased person that his or her body be im-

mediately buried, upon the filing of a written request upon such form as may be prescribed by the state board of health of the state of Montana, setting forth the surety that such body will be used only for the teaching and demonstration of anatomical science in this state.

History: En. Sec. 3, Ch. 102, L. 1943.

69-2304. Expenses. All expenses connected with the transportation of unclaimed dead human bodies to institutions of higher learning at the request of said institution along with any expense directly connected with the special preparation of such bodies for use in teaching or demonstration work in anatomical science shall be borne by the institutions of higher learning making application for the use of said dead human bodies.

History: En. Sec. 4, Ch. 102, L. 1943.

69-2305. Bodies to be kept three months before use thereof. Dead human bodies procured by an institution of higher learning under this act shall be kept by that institution for a period of time of at least three (3) months after the date of death before said bodies may be used for the purpose of teaching of anatomical science.

History: En. Sec. 5, Ch. 102, L. 1943.

69-2306. Burial permit to accompany body—burial. The burial permit shall accompany the body to said educational institution and by it be properly registered for burial and buried by a licensed embalmer or undertaker, at the expense of the institution of higher learning making application for the use of said dead human bodies.

History: En. Sec. 6, Ch. 102, L. 1943.

69-2307. Penalty. Any person or persons violating any of the provisions of this act shall be guilty of a misdemeanor and upon conviction shall be punishable by a fine not exceeding five hundred dollars (\$500.00). History: En. Sec. 7, Ch. 102, L. 1943.

69-2308. Limitation on right to perform autopsy or dissection. right to perform an autopsy upon, or to dissect the dead body of a human being, or make any post-mortem examination involving dissection of any part of such body, shall be limited to the following cases, viz.: (a) To cases where such autopsy or dissection is specifically authorized by a statute or code provision of this state, (b) or to cases where a coroner is authorized to hold an inquest upon a dead body, as provided by section 94-201-1, and any code section continuing authority for such inquest and then only to the extent such coroner may authorize dissection or autopsy, (c) cases where dissection, autopsy or post-mortem examination is directed or authorized by the last will and testament, or codicil thereto or other written statement of the deceased, whether such statement be of testamentary character or otherwise, (d) cases where the husband, wife or next of kin charged by law with the duty of burial, shall, in writing, authorize dissection, autopsy or other post-mortem examination of the dead body for the purpose of ascertaining the cause of death, and then only to the extent so authorized; and (e) cases where the decedent died in one of the institutions located in the state of Montana, hereafter named, leaving no surviving husband, wife or next of kin charged by law with the duty of burial, and when the manager or superintendent of the institution where such body was at the time of death first obtains an order of the district court in, and for the county where such institution is located, authorizing dissection, autopsy or other post-mortem examination, for the purpose of ascertaining the cause of death, and then only to the extent so authorized by such order of the district court. The said institutions are:

- 1. Hospitals operated by the United States veterans' administration,
- 2. Hospitals and sanitariums operated by the state of Montana,
- 3. Montana soldiers' home,
- 4. Montana school for deaf and blind,
- 5. Montana state industrial and vocational schools,
- 6. Montana state orphans' home,
- 7. Montana training school for the feeble-minded,
- 8. Montana state penitentiary.

In all other cases where the decedent died in the state of Montana and while a resident of the state of Montana at the time of death, leaving no surviving husband, wife, or next of kin charged by law with the duty of burial, the attending physician at the time of decedent's death first obtains an order of the district court in, and for the county in which such death occurred, authorizing dissection, autopsy or other post-mortem examination for the purpose of ascertaining the cause of death, and then only to the extent so authorized by the order of the district court, after it has been shown to the satisfaction of the court that applicant for the order has made due and diligent search for the next of kin charged by law with the duty of burial, and after such due and diligent search was unable to find said next of kin.

History: En. Sec. 1, Ch. 172, L. 1949.

Collateral References

Dead Bodies № 1.

25 C.J.S. Dead Bodies § 2.

69-2309. Qualifications to perform autopsies or post-mortem examinations—written report. All dissections, autopsies or other post-mortem examinations involving dissection of any part of the human body, (except preparation of the body for burial or cremation by duly licensed embalmers), shall be performed by a physician or surgeon duly licensed to practice such profession by the state board of medical examiners of the state of Montana, and upon completion of any such dissection, autopsy or other post-mortem examination, the physician or surgeon, whether one or more participating, shall deliver a written report thereof, together with his findings as to cause of death, to the next of kin of decedent, or the representative of decedent's estate, or to other persons lawfully requesting such procedures in the cases herein permitted.

History: En. Sec. 2, Ch. 172, L. 1949.

69-2310. Autopsy performed contrary to law a misdemeanor—persons exempt from law. Every person who shall make, or cause to be made, any dissection of the body of a human being, or to have any autopsy performed

thereon, or to have any other post-mortem examination performed and accomplished except as hereinbefore provided, shall be guilty of a misdemeanor. But nothing in this act shall affect, impair or restrict the right of a duly licensed embalmer, undertaker or mortician to dissect the dead body of a human to the extent necessary and proper in the preservation or preparation of such body for burial, cremation or other lawful disposition, in all cases as authorized by the laws of Montana.

History: En. Sec. 3, Ch. 172, L. 1949.

Collateral References
Dead Bodies 7.
25 C.J.S. Dead Bodies 10.

CHAPTER 24

HOMES FOR THE AGED-INSPECTION

Section 69-2401. Definitions.

69-2402. Application for license.

69-2403. License.

69-2404. Inspection of boarding or nursing homes.

69-2405. Rules and regulations—inspections—cancellation of license.

69-2406. Penalty for unlicensed operation.

- 69-2401. Definitions. (a) A "boarding home" or "nursing home" for aged persons is hereby defined to be a home where two or more aged persons are residing and boarding or receiving nursing care, operated by any person for compensation or hire, whether such aged persons are receiving public assistance from the state of Montana or any county therein, or are supported in whole or in part by their own or other private funds or resources.
- (b) The "operator" of a boarding home or nursing home is defined to be any person, partnership, voluntary association or corporation who conducts or operates a home for the care, nursing care, maintenance, board and room of two or more aged persons unrelated to him by blood or marriage for compensation and hire.
- (c) The term "secretary and/or executive officer," shall mean the secretary and/or executive officer of the state board of health of Montana.
- (d) Any person or persons caring for individuals related by blood or marriage shall be exempt from the requirement of licensing and inspection unless operating a commercial nursing home or boarding home.

History: En. Sec. 1, Ch. 192, L. 1947; amd. Sec. 1, Ch. 243, L. 1959.

Collateral References Innkeepers©=3. 43 C.J.S. Innkeepers § 1.

69-2402. Application for license. All operators of boarding homes or nursing homes for the aged operating on the effective date of this act, within the meaning of this act, shall apply, within ten days and annually thereafter, in writing to the state board of health of the state of Montana for a license to operate such home, on forms to be provided by such board for such license. Any nursing or boarding home hereafter established shall apply for such license fifteen (15) days prior to acceptance of such aged persons, and such license shall expire June 30 following the date of issuance. Each application for such license shall be accompanied by a license fee of

five (\$5.00) dollars, which, if the license is granted, shall be retained and deposited in the state treasury, or, if the application be denied the fee shall be returned to the applicant.

History: En. Sec. 2, Ch. 192, L. 1947.

Collateral References
Innkeepers 4.
43 C.J.S. Innkeepers 8 6.

69-2403. License. If the application for a license is granted, a license in writing shall be issued by the state board of health in such form as it may determine; however, such license must state the name of the operator and the location of the boarding home or nursing home, giving the street address or number, if the home is located in a city having residence numbers. Such license is not transferable. All licenses so issued must be exhibited for inspection and examination at all reasonable hours to any interested person upon request. All licenses issued hereunder shall expire on the 30th day of June of each calendar year.

History: En. Sec. 3, Ch. 192, L. 1947.

69-2404. Inspection of boarding or nursing homes. Upon the receipt of each application, together with the fee herein provided for a license, the state board of health shall cause the boarding home or nursing home of the applicant to be inspected by its authorized representative, and if it finds that the boarding home or nursing home is conducted in a manner consistent with the health and welfare of the residents therein, such license shall be granted. If the state board of health has inspected such home within ninety (90) days prior to the receipt of an application for such license or renewal thereof, no further inspection need be made prior to the issuance or renewal thereof, if in the considered judgment of the representative of the board such further inspection is unnecessary.

History: En. Sec. 4, Ch. 192, L. 1947.

69-2405. Rules and regulations—inspection—cancellation of license. The state board of health may promulgate rules and regulations consistent with the purposes of this act, establishing the standards by which applications are to be determined for licenses under the provision of this act. The executive officer of the state board of health of the state of Montana, or his authorized agent, shall have the power and authority to inspect all such licensed boarding homes or nursing homes. If such inspection shows any violation of the rules and regulations as promulgated under this act, the secretary and/or executive officer shall cause appropriate notice to be given to the operator. Any operator so notified shall appear for a hearing within twenty (20) days, to show cause why his license should not be canceled because of the continued failure on the part of the operator to observe such rules and regulations. The operator of such boarding home or nursing home shall give to such representative such information as may be required and afford them every reasonable facility for observing the operation of such boarding home or nursing home.

History: En. Sec. 5, Ch. 192, L. 1947.

69-2406. Penalty for unlicensed operation. Any operator who maintains or conducts a boarding home or nursing home for the aged or assists

in the conducting and maintaining of such home without having first obtained a license in writing as herein provided, without having filed with the state board of health as herein provided, his proper application for the operation of such home, together with the fee as herein provided, and which application is still pending undecided, shall be guilty of a public offense and punished as a misdemeanor.

History: En. Sec. 6, Ch. 192, L. 1947.

CHAPTER 25

RETIRING ROOM FOR EMPLOYEES SERVING FOOD TO THE PUBLIC REQUIRED

Section 69-2501. Retiring room for employees of hotels, restaurants and other businesses—exceptions.

69-2502. Act to be enforced by board of health.

69-2503. Penalty for violation. 69-2504. Annulment of license.

69-2501. Retiring room for employees of hotels, restaurants and other businesses—exceptions. Any person, partnership, corporation or association, owning, operating or conducting any hotel, restaurant, cafe, eating house, eating place, lunch counter or lunch bar, where food and/or drink is handled and offered to the public for sale at retail, whether such food is prepared and cooked on the premises or prepared elsewhere and handled and offered to the public on the premises, shall at all times maintain and keep at all times in sanitary condition a retiring room within the premises, where all cooks, waiters, employees and handlers of food, or others connected with the handling thereof on the premises, may resort for purpose of hygiene and sanitation. Such retiring room shall be equipped with modern toilet and lavatory facilities, connected to running water, hot and cold, and connected to sewer or approved cesspool outlets, and shall be furnished with soap, clean towels and disinfectants and germicides for personal use by such food handlers and employees, provided however, that the requirements of this section shall not apply to any such establishment, person, partnership, corporation or association employing less than five (5) persons on a full-time basis; provided, however, that this act shall not apply to restaurants, lunch counters or lunch rooms operated for the benefit of railroad stations, where there are retiring rooms as are defined and described in this act, provided and maintained in such railroad stations within a distance of not more than seventy-five (75) feet from such restaurants, lunch counters or lunch rooms.

History: En. Sec. 1, Ch. 203, L. 1945.

Collateral References Health 31. 39 C.J.S. Health § 25.

69-2502. Act to be enforced by board of health. The state board of health of the state of Montana is hereby charged with the duty of enforcing the provisions of this act and compelling adherence to its provisions.

History: En. Sec. 2, Ch. 203, L. 1945.

69-2503. Penalty for violation. Any person, partnership, corporation, or association violating any of the provisions of this act shall be deemed

guilty of a misdemeanor, and upon conviction thereof shall be liable to fine not exceeding six hundred (\$600.00) dollars or to imprisonment not exceeding seven (7) months, or both such fine and imprisonment.

History: En. Sec. 3, Ch. 203, L. 1945.

69-2504. Annulment of license. Upon said conviction, any license issued by the state of Montana under and by authority of which any said person, partnership, corporation or association operates or conducts any such eating place or establishment, shall be automatically annulled, and no license shall thereafter be issued to said former licensee until the conditions of this act are satisfied.

History: En. Sec. 4, Ch. 203, L. 1945.

CHAPTER 26

MATS OR OTHER FLOOR COVERINGS REQUIRED IN CERTAIN ESTABLISHMENTS WHERE FOOD IS SERVED

Section 69-2601. Mats or other covering on cement floors required in restaurants and other designated places.

69-2602. Board of health to enforce act.

69-2603. Penalty.

69-2601. Mats or other covering on cement floors required in restaurants and other designated places. Any person, partnership, corporation or association owning, operating, leasing, conducting or managing any restaurant, cafe, lunch counter, or soda fountain where prepared food is served to be consumed on the premises shall install therein mats or other floor coverings of wood, fiber, linoleum or other like material in front of all stoves, dish sinks and other installations where employees are compelled to stand for considerable periods of time on concrete or cement floors.

History: En. Sec. 1, Ch. 202, L. 1945.

Collateral References Health@=31. 39 C.J.S. Health § 25.

69-2602. Board of health to enforce act. The state board of health of the state of Montana is hereby charged with the duty of enforcing the provisions of this act.

History: En. Sec. 2, Ch. 202, L. 1945.

69-2603. Penalty. Any person, firm, partnership, corporation, association or manager violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and shall be liable to a fine not exceeding six hundred (\$600.00) dollars or to imprisonment not exceeding seven (7) months or to both such fine and imprisonment.

History: En. Sec. 3, Ch. 202, L. 1945.

CHAPTER 27

FIREWORKS REGULATION

Section 69-2701. Fireworks prohibited and defined for the purposes of this act.

69-2702. Supervised public display of fireworks. 69-2703. Damage indemnity bond from licensee.

69-2704. Where act does not apply. 69-2705. Confiscation. 69-2706. Penalties.

69-2701. Fireworks prohibited and defined for the purposes of this act.
a. It shall be unlawful to sell, transport or use any fireworks within the state of Montana except as hereinafter provided.

- b. The term "fireworks" shall mean and include any combustible, or explosive composition, or any substance or combination of substances, or article prepared for the purpose of producing a visible or audible effect by combustion, explosion, deflagration or detonation, and shall include sky rockets, Roman candles, Daygo bombs, blank cartridges, toy cannons, toy canes, or toy guns in which explosives other than toy paper caps are used, the type of balloons which require fire underneath to propel the same, firecrackers, torpedoes, sparklers or other fireworks of like construction and any fireworks containing any explosive of flammable compound or any tablets or other device containing any explosive substance. Nothing in this law shall be construed as applying to toy paper caps containing not more than twenty-five hundredths of a grain of explosive composition per cap, and to the manufacture, storage, sale or use of signals necessary for the safe operation of railroads or other classes of public or private transportation, nor applying to the military or navy forces of the United States or of this state, or to peace officers, nor as prohibiting the sale or use of blank cartridges for ceremonial, or theatrical, or athletic events.
- c. It shall be lawful for any individual, firm, partnership, corporation or association to possess for sale within the state, sell or offer for sale, at retail, or use, within the state of Montana, the permissible fireworks herewith enumerated.

Permissible fireworks shall include dangerous articles and, more specifically, shall include and be limited to the following, but specifically excluding sky rockets, Roman candles and Daygo bombs:

- (1) Helicopter type spinners, total pyrotechnic composition not to exceed twenty grams each in weight;
- (2) Cylindrical fountains, total pyrotechnic composition not to exceed twenty-five grams each in weight. The inside tube diameter shall not exceed 3/4 inch:
- (3) Cone fountains, total pyrotechnic composition not to exceed fifty grams each in weight;
- (4) Wheels, total pyrotechnic composition not to exceed sixty grams in weight, for each driver unit, but there may be any number of drivers on any one wheel. The inside bore of driver tubes shall not be over ½ inch;
- (5) Illuminating torches and colored fire in any form, total pyrotechnic composition not to exceed one hundred grams each in weight;
- (6) Sparklers and dipped sticks, total pyrotechnic composition not to exceed one hundred grams each in weight. Pyrotechnic composition containing any chlorate shall not exceed five grams;
- (7) Firecrackers with soft casings, the external dimensions of which do not exceed one and one-half inches in length or one-quarter inch in

diameter, total pyrotechnic composition not to exceed two grains each in weight;

(8) Whistles without report, total pyrotechnic composition not to exceed forty grams each in weight;

It shall be unlawful for any individual under the age of twenty-one (21) to possess for sale, sell or offer for sale, within the state of Montana, permissive fireworks herein enumerated.

It shall be unlawful for any wholesaler to sell or offer for sale, within the state of Montana fireworks except as herein defined. It shall be lawful for said wholesalers, however, to transport said fireworks within the state of Montana for sale outside of the state of Montana.

- d. No person, firm or corporation shall offer fireworks of any kind as defined herein for sale at retail before the 24th day of June and after the 5th day of July.
- e. It shall be unlawful for any individual, firm, partnership or corporation to discharge or cause to be discharged any pyrotechnics of any description whatever within the exterior boundaries of any state forest, or state park, or state recreation area.

History: En. Sec. 2, Ch. 143, L. 1947; 1, Ch. 273, L. 1959; amd. Sec. 1, Ch. 107, amd. Sec. 1, Ch. 136, L. 1957; amd. Sec. L. 1961.

69-2702. Supervised public display of fireworks. Except as hereinafter provided, it shall be unlawful for any person, firm, copartnership, association or corporation to possess, offer for sale, expose for sale, sell, or use or explode any fireworks; provided that the state fire marshal and the governing body of any city, town or township or county shall have power, under reasonable rules and regulations adopted by it, to grant permits for supervised public displays of fireworks to be held therein by municipalities, fair associations, amusement parks, and other organizations or groups of individuals. Every such display shall be handled by a competent operator to be approved by the state fire marshal or by the governing body of the municipality in which the display is to be held and shall be of such a character, and so located, discharged or fired as in the opinion of the chief of the fire department or such other officer as may be designated by the governing body of the municipality, after proper inspection, shall not be hazardous to property or endanger any person or persons. Application for permits shall be made in writing at least fifteen (15) days in advance of the date of the display. After such privilege shall have been granted, sales, possession, use and distribution of fireworks for such display shall be lawful for that purpose only. No permit granted hereunder shall be transferable. The term "municipalities" shall include cities, incorporated towns or townships.

History: En. Sec. 3, Ch. 143, L. 1947; amd. Sec. 2, Ch. 273, L. 1959.

Collateral References Explosives \$3. 35 C.J.S. Explosives § 3.

69-2703. Damage indemnity bond from licensee. The governing body of the municipality shall require a bond deemed adequate by the municipality from the licensee in a sum not less than five hundred dollars (\$500.00)

conditioned for the payment of all damages which may be caused either to a person or persons or to property by reason of the licensed display, and arising from any acts of the licensee, his agents, employees or subcontractors.

History: En. Sec. 4, Ch. 143, L. 1947.

69-2704. Where act does not apply. Nothing in this act shall be construed to prohibit the sale of any kind of fireworks to a person holding a permit from any municipality at the display covered by such permits; or the use of fireworks by railroads or other transportation agencies for signal purposes or illumination, or when used in quarrying or blasting or other industrial use, or the sale or use of blank cartridges for a show or theater. or for signal or ceremonial purposes in athletics or sports, or for use by military organizations, or organizations composed of veterans of the United States army, navy, or marine corps.

History: En. Sec. 5, Ch. 143, L. 1947; amd. Sec. 3, Ch. 273, L. 1959.

69-2705. Confiscation. The state fire marshal or any sheriff, police officer or constable shall seize, take, remove, or cause to be removed at the expense of the owner all stocks of fireworks or combustibles offered or exposed for sale, stored, or held in violation of this act.

History: En. Sec. 6, Ch. 143, L. 1947.

Penalties. Any person, firm, copartnership, association or corporation violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00); or in the case of individuals, the members of a partnership and the responsible officers and agents of an association or corporation, by imprisonment in the county jail for a period not less than thirty (30) days nor more than six (6) months, or by both such fine and imprisonment.

History: En. Sec. 7, Ch. 143, L. 1947; amd. Sec. 4, Ch. 273, L. 1959.

CHAPTER 28

REFRIGERATED LOCKERS—REGULATION OF

Section 69-2801. Declaration as to need of act. 69-2802. Definitions. 69-2803. License required. 69-2804. Fee—term of license. 69-2805. Cancellation or suspension of license-procedure. 69-2806. Diseased persons not to work in locker plant. 69-2807. Rules and regulations-co-operative agreements. 69-2808. Inspections. 69-2809. Temperature control and requirements. 69-2810. Authority of board to issue subpoenas. 69-2811. Penalty. 69-2812. Liability for loss of goods.

69-2813. Lien of operator for charges-requirements on receipt of game, veal and beef.

69-2814. Repealed.

69-2815. License fee supersedes other fees. 69-2816. Separability clause.

69-2801. Declaration as to need of act. This act is in exercise of the police powers of the state for the protection of the safety, health and welfare of the people of the state. It hereby is found and declared that the public welfare requires control and regulation of the operation of refrigerated lockers and of the sale, handling and processing of articles of human food in connection therewith, and the control, inspection and regulation of persons engaged therein, in order to prevent or eliminate unsanitary, unhealthful, fraudulent, and unfair or uneconomic practices and conditions in connection with the refrigerated locker business, which practices and conditions endanger public health, defraud customers, jeopardize the public source of supply and storage facilities of essential food products, and adversely affect an important and growing industry. It is further found and declared that the regulation of the refrigerated locker business, as above outlined, is in the interest of the economic and social well-being and the health and safety of the state and all of its people.

History: En. Sec. 1, Ch. 220, L. 1947. Collate Health

Collateral References Health \$\infty\$ 31. 39 C.J.S. Health \$ 25.

69-2802. Definitions. Except where the context indicates a different meaning, terms used in this act shall be defined as follows:

- (a) "Refrigerated locker" or "locker" means any place, premises or establishment where facilities for the cold storage and preservation of human food in separate and individual compartments are offered to the public upon a rental or other basis providing compensation to the person offering such services.
- "Frozen food processing plant" means a location or establishment in which freezing facilities are used to freeze meat or meat products, fruits, vegetables, or any other foods for delivery to and frozen storage by the ultimate consumer and which has one (1) or more of the following facilities: a slaughterhouse; a chill room; facilities for cutting, blanching, preparing, wrapping and packaging meat and meat products, fruits, vegetables, or any other food; a refrigerated holding room for storing frozen meat or meat products, fruits, vegetables, or any other food prior to delivery to the ultimate consumer; and shall include all attached or detached buildings, rooms, open or enclosed spaces under the control of the operator and used in any capacity in connection with the operation of the plant: providing that when this subsection is applicable to any meat market paying a fee and licensed by the state board of health under other provisions of law said meat market shall be exempt from the payment of the license fee under section 69-2804, but shall otherwise comply with provisions of this act and the rules and regulations promulgated thereunder.
- (e) "Person" includes any individual, partnership, corporation, association, county, municipality, co-operative group, or other entity engaging in the business of operating or owning or offering the services of refrigerated lockers or frozen food processing plants as above defined.
- (d) The term "board" means the state board of health of the state of Montana.

History: En. Sec. 2, Ch. 220, L. 1947; amd. Sec. 14, Ch. 264, L. 1955; amd. Sec. 1, Ch. 149, L. 1959.

69-2803. License required. No person hereafter shall engage within this state in the business of owning, operating or offering the services of any refrigerated locker or lockers or any frozen food processing plant or plants without having obtained from the board a license for each such place of business. Application for such license shall be made in writing and under oath to the board, on such forms and with such pertinent information as it may deem necessary. Such licenses shall be granted as a matter of right, unless conditions exist which are grounds for a cancellation or revocation of a license as hereinafter set forth, and subject to the right of applicant for license to hearing and judicial review as hereinafter set forth.

History: En. Sec. 3, Ch. 220, L. 1947; amd. Sec. 15, Ch. 264, L. 1955; amd. Sec. 2, Ch. 149, L. 1959.

Collateral References Licenses 11(1). 53 C.J.S. Licenses § 30.

69-2804. Fee—term of license. (a) There shall be paid to the board with each application for such license or for renewal of such license an annual license fee of ten dollars (\$10.00).

(b) Each such license shall expire on December 31st following its date of issue, unless sooner revoked for cause. Renewal may be obtained annually by paying the required annual license fee. Such license fee shall not be transferable to any person nor be applicable to any location other than that for which originally issued. Application made after July 1st of each year shall be entitled to such license for the remainder of the year on payment of a fee of five dollars (\$5.00).

History: En. Sec. 4, Ch. 220, L. 1947; amd. Sec. 16, Ch. 264, L. 1955; amd. Sec. 3, Ch. 149, L. 1959.

69-2805. Cancellation or suspension of license—procedure. (a) The board may cancel or suspend any such license if it finds after proper investigation that (1) the licensee has violated any provisions of this act or of any other law of this state relating to the operation of refrigerated lockers or of the sale of any human food in connection therewith, or any regulation effective under any act the administration of which is in the charge of the state board of health of Montana, or (2) the licensed refrigerated locker premises or any equipment used therein or in connection therewith is in an unsanitary condition and the licensee has failed or refused to remedy the same within ten (10) days after receipt from the board of written notice to do so.

- (b) No license shall be denied, revoked or suspended by the board without delivery to the applicant or licensee of a written statement of the grounds therefor or the charge involved and an opportunity to answer at public hearing such charge within ten (10) days from the date of such notice.
- (c) Any order made by the board suspending or revoking any license may be reviewed by application for writ of review (certiorari) commenced in the district court of the county in which the licensed premises are located, within ten (10) days from the date notice in writing of the board's order revoking or suspending such license has been served upon him.

(d) It shall be the duty of each county attorney to whom any violation of this act is reported to cause appropriate proceedings to be instituted and prosecuted in the district court in the county without delay, provided, however, that nothing in this act shall be construed as requiring the board to report for prosecution minor violations of the act whenever it believes that the public interest will best be served by a suitable notice of warning in writing.

History: En. Sec. 5, Ch. 220, L. 1947; amd. Sec. 17, Ch. 264, L. 1955.

69-2806. Diseased persons not to work in locker plant. No person afflicted with any contagious or infectious disease shall work or be permitted to work in or about any refrigerated locker, nor in the handling, dealing or processing of any human food in connection therewith.

History: En. Sec. 6, Ch. 220, L. 1947.

- 69-2807. Rules and regulations—co-operative agreements. (a) The board is hereby empowered to prescribe and to enforce such rules and regulations and to make such definitions, and to prescribe such procedure with regard to hearings, as it may deem necessary to carry into effect the full intent and meaning of this act.
- (b) The board is hereby authorized to enter into co-operative agreements with any of the state agencies or political subdivisions and it may delegate authority to these state agencies or political subdivisions for the purpose of carrying out the provisions of this act, or any part thereof.

History: En. Sec. 7, Ch. 220, L. 1947; amd. Sec. 18, Ch. 264, L. 1955.

69-2808. Inspections. The board, through such of its members, officers or agents as it may authorize, shall cause to be made periodically a thorough inspection of each establishment licensed under this act to determine whether or not the premises are constructed, equipped and operated in accordance with the requirements of this act and of all other laws of this state applicable to the operation either of refrigerated lockers or of the handling of human food in connection therewith, and of all regulations effective under this act relative to such operation. Such inspection shall also be made of each vehicle used by operator of refrigerated lockers or of an establishment handling human food in connection therewith, when such vehicle is used in transporting or distributing human food products to or from refrigerated lockers within this state.

History: En. Sec. 8, Ch. 220, L. 1947; amd. Sec. 19, Ch. 264, L. 1955.

Collateral References Food \$\iiiist\$3. 36A C.J.S. Food § 12(7).

69-2809. Temperature control and requirements. Every operator of a refrigerated locker plant shall provide a complete refrigeration system with adequate capacity and accurate and reliable controls for the maintenance of the following uniform temperatures of the various refrigerated rooms if provided, under extreme conditions of outside temperatures and under peak load conditions in the normal operation of the plant. The temperatures of the following rooms shall not exceed:

- (a) Chill room, temperatures within two (2) degrees (Fahrenheit) plus or minus of thirty-five (35) degrees (Fahrenheit) with a tolerance of ten (10) degrees (Fahrenheit) after fresh food is put in for chilling;
- (b) Sharp freeze room, sharp freeze compartments, temperatures of minus ten (-10) degrees (Fahrenheit) or lower, or temperatures of zero (0) degrees (Fahrenheit) or lower when forced air circulation is employed, with a tolerance of ten (10) degrees (Fahrenheit) for either type of installation after fresh food is put in for freezing;
- (c) Locker room temperatures of zero (0) degrees (Fahrenheit) with a tolerance of twelve (12) degrees (Fahrenheit) plus.

History: En. Sec. 9, Ch. 220, L. 1947.

69-2810. Authority of board to issue subpoenas. In any proceeding under this act the board may administer oaths and issue subpoenas, summon witnesses and take testimony of any person within the state of Montana.

History: En. Sec. 10, Ch. 220, L. 1947; amd. Sec. 20, Ch. 264, L. 1955.

69-2811. Penalty. Any person violating any provision of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars (\$100.00) for the first offense, and not less than two hundred dollars (\$200.00) for the second and for each and every subsequent offense, and each day that any violation continues shall constitute a separate offense.

History: En. Sec. 11, Ch. 220, L. 1947.

69-2812. Liability for loss of goods. The liability of the owner or operator of refrigerated lockers for loss of goods in lockers or in the operator's care shall be limited to negligence of operation or of employees.

History: En. Sec. 12, Ch. 220, L. 1947.

69-2813. Lien of operator for charges—requirements on receipt of game, veal and beef. Every operator of a locker shall have a lien upon all the property of every kind in his possession for all lockers' rentals, processing, handling or other charges due. Such lien may be foreclosed under the procedure as provided for chattel mortgages.

Locker owners and operators shall not be responsible for liability for violations of game or other laws by renters unless the contents of the locker are under the control of the locker plant operator. Except that operator shall not receive for processing quick freeze, or cold storage any quarter, half, or whole carcass of any beef or veal or game or game birds except that such carcass or portion herein mentioned, shall be properly stamped or tagged. In the event that carcass or portion herein mentioned shall not be properly stamped or tagged, said operator shall require a declaration to be made and signed showing required authority to said carcass or portion thereof described with the detail of obtaining possession, date of placing in the locker, the weight and the type of meat, said declaration

must be kept as a matter of record for one (1) year open to inspection by a duly authorized agent of the board.

History: En. Sec. 13, Ch. 220, L. 1947; amd. Sec. 21, Ch. 264, L. 1955.

69-2814. Repealed—Chapter 149, Laws of 1959.

not to be construed as warehousemen, was repealed by Sec. 4, Ch. 149, Laws This section (Sec. 14, Ch. 220, L. 1947), 1959. containing a provision that operators were

69-2815. License fee supersedes other fees. Payment of the license fee stipulated herein shall be accepted in lieu of any and all existing fees and charges for like purposes or intent which may be existent prior to the adoption of this act.

History: En. Sec. 15, Ch. 220, L. 1947.

69-2816. Separability clause. If any clause, sentence, paragraph, section or part of this act shall, for any reason, be adjudged or decreed to be invalid by any court of competent jurisdiction, such judgment or decree shall not affect, impair nor invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which said judgment or decree shall have been rendered.

History: En. Sec. 16, Ch. 220, L. 1947.

CHAPTER 29

HOSPITAL LICENSING AND SUPERVISION BY STATE BOARD OF HEALTH

Definitions. Section 69-2901. 69-2902. Purpose. 69-2903. Licensure. 69-2904. Application for license.

69-2905. Issuance and renewal of license.

69-2906. Denial or revocation of license—hearing and review.

69-2907. Rules, regulations and enforcement. 69-2908. Effective date of regulations. 69-2909. Inspections and consultations.

69-2910. Advisory hospital council. 69-2910.1. Transfer of powers and duties to advisory hospital council.

69-2911. Functions of advisory hospital council. 69-2912. Information confidential.

69-2913. Annual report of licensing agency.

69-2914. Judicial review.

69-2915. Penalties. 69-2916. Injunction. 69-2917. Discrimination by hospitals forbidden—interference with relation between physician and patient prohibited.

69-2918. Severability.

69-2901. Definitions. As used in this act:

(a) "Hospital" means a place devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment or care for not less than twenty-four hours in any week of two or more nonrelated individuals suffering from illness, disease, injury, or deformity, or a place devoted primarily to providing for not less than twenty-four hours in any week of obstetrical or other medical or nursing care for two or more nonrelated individuals. The term hospital includes public health centers.

- (b) "Person" means any individual, firm, partnership, corporation, company, association, or joint stock association, and the legal successor thereof.
- (c) "Governmental unit" means the state, or any county, municipality, or other political subdivision or any department, division, board or other agency of any of the foregoing.
- (d) "Licensing Agency" means the state board of health of the state of Montana.

History: En. Sec. 1, Ch. 269, L. 1947.

Hospital liens, secs. 45-1201 to 45-1205. Incorporation of hospitals, secs. 15-1401 to 15-1409.

Cross-References

Hospital attendants exempt from jury duty, sec. 93-1304.

69-2902. Purpose. The purpose of this act is to provide for the development, establishment and enforcement of standards (1) for the care of individuals in hospitals and (2) for the construction, maintenance and operation of hospitals, which in the light of advancing knowledge, will promote safe and adequate care of such individuals in hospitals.

History: En. Sec. 2, Ch. 269, L. 1947.

69-2903. Licensure. After July 1, 1947, no person or governmental unit, acting severally or jointly with any other person or governmental unit shall establish, conduct or maintain a hospital in this state without a license under this law.

History: En. Sec. 3, Ch. 269, L. 1947.

69-2904. Application for license. An application for a license shall be made to the state board of health of the state of Montana upon forms provided by it and shall contain such information as the board reasonably requires, which may include affirmative evidence of ability to comply with such reasonable standards, rules and regulations as are lawfully prescribed hereunder. Each application for license shall be accompanied by a license fee of ten dollars (\$10.00), which must be paid into the state treasury.

History: En. Sec. 4, Ch. 269, L. 1947.

69-2905. Issuance and renewal of license. Upon receipt of an application for license and the license fee, the board shall issue a license if the applicant and hospital facilities meet the requirements established under this law. A license, unless sooner suspended or revoked, shall be renewable annually without charge upon filing by the licensee, and approval by the board, of an annual report upon such uniform dates and containing such information in such form as the board prescribed by regulation. Each license shall be issued only for the premises and persons or governmental units named in the application and shall not be transferable or assignable except with the written approval of the board. Licenses shall be posted in a conspicuous place on licensed premises.

History: En. Sec. 5, Ch. 269, L. 1947.

69-2906. Denial or revocation of license—hearing and review. The board after notice and opportunity for hearing to the applicant or licensee is authorized to deny, suspend or revoke a license in any case in which it finds that there has been a substantial failure to comply with the requirements established under this law.

Such notice shall be effected by registered mail, or by personal service setting forth the particular reasons for the proposed action and fixing a date not less than thirty days from the date of such mailing or service, at which the applicant or licensee shall be given an opportunity for a prompt and fair hearing. On the basis of any such hearing, or upon default of the applicant or licensee the board shall make a determination specifying its findings of fact and conclusions of law. A copy of such determination shall be sent by registered mail or served personally upon the applicant or licensee. The decision revoking, suspending or denying the license or application shall become final thirty days after it is so mailed or served, unless the applicant or licensee within such thirty day period, commences an action in the district court, pursuant to section 69-2914.

The procedure governing hearings authorized by this section shall be in accordance with rules promulgated by the board with the advice of the advisory hospital council. A full and complete record shall be kept of all proceedings, and all testimony shall be reported but need not be transcribed unless the decision is reviewed pursuant to section 69-2914. A copy or copies of the transcript may be obtained by any interested party on payment of the cost of preparing such copy or copies. Witnesses may be subpoenaed by either party.

History: En. Sec. 6, Ch. 269, L. 1947.

69-2907. Rules, regulations and enforcement. The board with the advice and approval of the advisory hospital council, shall adopt, amend, promulgate and enforce such rules, regulations and standards with respect to all hospitals or different types of hospitals to be licensed hereunder as may be designed to further the accomplishment of the purposes of this law in promoting safe and adequate care of individuals in hospitals in the interest of public health, safety and welfare.

History: En. Sec. 7, Ch. 269, L. 1947. Collateral References
Hospitals ← 3.
41 C.J.S. Hospitals § 5.

69-2908. Effective date of regulations. Any hospital which is in operation at the time of promulgation of any applicable rules or regulations or minimum standards under this act shall be given a reasonable time, under the particular circumstances not to exceed one year from the date of such promulgation, within which to comply with such rules and regulations and minimum standards.

History: En. Sec. 8, Ch. 269, L. 1947.

69-2909. Inspections and consultations. The board shall make or cause to be made such inspections and investigation as it deems necessary. The board may prescribe by regulations that any licensee or applicant desiring

to make specified types of alteration or addition to its facilities or to construct new facilities shall before commencing such alteration, addition or new construction, submit plans and specifications therefor to the licensing agency for preliminary inspection and approval or recommendations with respect to compliance with the regulations and standards herein authorized. Necessary conferences and consultations may be provided.

History: En. Sec. 9, Ch. 269, L. 1947.

69-2910. Advisory hospital council. The governor shall appoint an advisory hospital council to advise and consult with the board in carrying out the administration of this act. The council shall consist of the executive officer of the state board of health (in various acts designated as "secretary" of said board) who shall serve as chairman ex officio, the state director of the department of public welfare, ex officio, and the following nine (9) members, namely: three (3) individuals of recognized ability in the field of nongovernment hospital administration; three (3) individuals of recognized ability in the fields of medicine and surgery, nursing, welfare, public health, architecture, or allied professions in the field of health, and three (3) individuals with broad civic interests representing consumers of hospital services. Each member shall hold office for a term of four (4) years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and, the terms of office of the members first taking office shall expire, as designated at the time of appointment, three at the end of the second year, three at the end of the third year, three at the end of the fourth year, after the date of appointment. Council members while serving on the business of the council shall be entitled to receive ten dollars (\$10.00) per diem, and, also, their actual and necessary travel and subsistence expenses while so serving away from their place of residence. The council shall meet as frequently as the chairman deems necessary, but not less than once each year. Upon request by any three (3) or more members, it shall be the duty of the chairman to call a meeting of the council.

History: En. Sec. 10, Ch. 269, L. 1947.

69-2910.1. Transfer of powers and duties to advisory hospital council. That the advisory hospital council provided for by section 69-3005 be hereby abolished and the powers and duties of said council be transferred to the advisory hospital council, as created and provided for in section 69-2910.

History: En. Sec. 1, Ch. 78, L. 1953.

Compiler's Note

Section 69-3005, referred to above, was repealed by Sec. 2, Ch. 78, Laws 1953.

- 69-2911. Functions of advisory hospital council. The advisory hospital council shall have the following responsibilities and duties:
- (a) To consult and advise with the board in matters of policy affecting administration of this act, and in the development of rules, regulations and standards provided for hereunder.

(b) To review and approve, before the same becomes effective, rules, regulations and standards authorized hereunder, prior to their promulgation by the board as specified herein.

History: En. Sec. 11, Ch. 269, L. 1947.

69-2912. Information confidential. Information received by the board through filed reports, inspection, or as otherwise authorized under this law shall not be disclosed publicly in such a manner as to identify individuals or hospitals, except in a proceeding involving the question of licensure.

History: En. Sec. 12, Ch. 269, L. 1947.

69-2913. Annual report of licensing agency. The board shall prepare and publish an annual report of its activities and operations under this law; the original of such report shall be transmitted to, and filed in the office of the governor.

History: En. Sec. 13, Ch. 269, L. 1947.

69-2914. Judicial review. Any applicant or licensee of the state acting through the attorney general aggrieved by the decision of the board after a hearing, may, within thirty (30) days after mailing or serving of notice of the decision as provided in section 69-2906, commence an action in the district court of the county in which the hospital is located or to be located. by the filing of a verified complaint against the board as defendant, and summons shall issue, and all further proceedings be conducted as in the case of ordinary civil actions. The board shall, upon filing its answer, certify and file therewith in the court wherein the action is pending a certified copy of the record and decision, including the complete transcript of the hearings on which the decision is based. Findings of fact by the board shall be conclusive unless substantially contrary to the weight of the evidence, or unless in conflict with law, but upon good cause shown the court may remand the case to the board to take further evidence, and the board may thereupon affirm, reverse, or modify its decision. The court may affirm, modify or reverse the decision of the board and either the applicant or licensee or the board or state may apply for such further review by appeal or otherwise, as is provided by law. Pending final disposition of the matter the status quo of the applicant or licensee shall be preserved, except as the court otherwise orders in the public interest.

History: En. Sec. 14, Ch. 269, L. 1947.

69-2915. Penalties. Any person establishing, conducting, managing, or operating any hospital without a license under this law shall be guilty of a misdemeanor, and upon conviction shall be fined not more than one hundred dollars (\$100.00) for the first offense and not more than three hundred dollars (\$300.00) for each subsequent offense, and each day of a continuing violation after conviction shall be considered a separate offense.

History: En. Sec. 15, Ch. 269, L. 1947.

69-2916. Injunction. Notwithstanding the existence or pursuit of any other remedy, the board, may in the manner provided by law upon the

advice of the attorney general who shall represent the board in the proceedings maintain an action in the name of the state for injunction or other process against any person or governmental unit to restrain or prevent the establishment, conduct, management or operation of a hospital without a license under this law.

History: En. Sec. 16, Ch. 269, L. 1947.

- 69-2917. Discrimination by hospitals forbidden-interference with relation between physician and patient prohibited. (a) Notwithstanding any other provision of this act, no person, firm, copartnership, association, corporation, public or private, and no religious, denominational or secular order, or organization, trustees or trust conducting or operating either directly or as lessee, or otherwise, a hospital or hospitals not maintained for private or corporate pecuniary profit, or operating or conducting a hospital or hospitals which are institutions of public charity, any of which hospitals in any case are exempt, or cause themselves to become exempt, under applicable law from any state, county or municipal tax by reason of their nonprofit status or charitable nature or character, shall in any manner or by any device discriminate between the patients of any regularly licensed physician for or upon any ground or reason whatever, including the fact that any such physician is not a member of the medical or surgical, or other staff, clinic, or internal instrumentality of such hospitals. All such hospitals are hereby directed, required and compelled to admit, receive and care for the patients of any regularly licensed physician and surgeon, under the same terms and conditions as may be established and promulgated by the governing authority, management or staff of said hospital for the patients of any other regularly licensed physician without discrimination, direct or indirect.
- (b) Notwithstanding any other provision of this act, the free and confidential professional relation between licensed physician and patient shall continue and remain unaffected and unchanged, and be preserved as a privileged relationship; and licensed physicians shall continue to have direction over their patients in hospitals.
- (c) The licensing agency, advisory council, director and all others charged with the administration of this act shall have no authority, by rule, regulation, or administrative direction, or other device, to modify, alter, or abridge any of the provisions of this section, and the faithful observance of the provisions hereof shall be an express condition of all licenses issued or reissued hereunder.
- (d) Nothing in this act or the rules and regulations adopted pursuant thereto shall be construed as authorizing the supervision, regulation, or control of the remedial care or treatment of residents or patients in any home or institution conducted for those who rely upon treatment by prayer or spiritual means in accordance with the creed or tenets of any well recognized church or religious denomination.

History: En. Sec. 17, Ch. 269, L. 1947.

Cross-Reference

Discrimination by hospitals forbidden, sec. 94-3557.

Collateral References

Exclusion of or discrimination against physician or surgeon by hospital authorities. 24 ALR 2d 850.

69-2918. Severability. If any provision of this act or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions or application of this act which can be given effect without the invalid provision or application, and to this end the provisions of the act are declared to be severable.

History: En. Sec. 19, Ch. 269, L. 1947.

CHAPTER 30

MONTANA HOSPITAL SURVEY AND CONSTRUCTION ACT

Section 69-3001. 69-3002. Definitions. 69-3003. Administration-hospital survey and construction. 69-3004. General powers and duties. 69-3005. Repealed. 69-3006. Survey and planning activities. 69-3007. Construction program. 69-3008. 69-3009. Application for federal funds for survey and planning-expenditure. State plan. 69-3010. Minimum standards for hospital and medical facilities maintenance and operation. 69-3011. Priority of projects. 69-3012. Construction projects—applications. 69-3013. Consideration and forwarding of applications.

69-3014. Inspection of projects.

69-3015. Hospital and medical facilities construction fund. 69-3016. Consolidated applications by two or more counties.

69-3017. Severability.
69-3018. State and federal participation in hospital and medical facilities construction.

69-3001. Title. This act may be cited as the "Montana Hospital Survey and Construction Act."

History: En. Sec. 1, Ch. 270, L. 1947.

69-3002. Definitions. As used in this act:

- "Board" means the state board of health of the state of Montana.
- "The Federal Act" means Title VI of the Public Health Service Act (42 U. S. C. 291 et seq.) as now and hereafter amended.
- (c) "The Surgeon General" means surgeon general of the public health service of the United States.
- "Hospital" includes public health centers and general, tuberculosis, mental, chronic disease, and other types of hospitals, and related facilities, such as laboratories, out-patient departments, nurses' home and training facilities, and central service facilities operated in connection with hospitals, but does not include any hospital furnishing primarily domiciliary care.
- "Public Health Center" means a publicly owned facility for the provision of public health services, including related facilities such as laboratories, clinics, and administrative offices operated in connection with public health centers.
- "Nonprofit Hospital" and "Nonprofit Medical Facility" means any hospital or medical facility owned or operated by one or more nonprofit corporations or associations, no part of the net earnings of which inures,

or may lawfully inure, to the benefit of any private shareholder or individual.

- (g) "Director" means the principal administrative officer of the division of hospital survey and construction of the said state board of health of Montana as appointed by said board.
- (h) "Medical facilities" means diagnostic or diagnostic and treatment centers, rehabilitation facilities and nursing homes as those terms are defined in the federal act, and such other medical facilities for which federal aid may be authorized under the federal act.

History: En. Sec. 2, Ch. 270, L. 1947; amd. Sec. 1, Ch. 215, L. 1955.

- 69-3003. Administration—hospital survey and construction. The state board of health of the state of Montana shall possess, exercise and carry out, in the field of hospital survey and construction, the powers, functions and duties assigned to it by law and for all such purposes the board shall constitute the sole agency of the state of Montana. Specifically, the board is hereby charged with the duties of
- (1) making an inventory of existing hospitals, and medical facilities and, surveying the need for construction of hospitals and medical facilities, and developing a program of hospital and medical facilities construction as provided in sections 69-3006 to 69-3008, and
- (2) developing and administering a state plan for the construction of public and other nonprofit hospitals and medical facilities as provided in sections 69-3009 to 69-3016.

History: En. Sec. 3, Ch. 270, L. 1947; amd. Sec. 2, Ch. 215, L. 1955; amd. Sec. 22, Ch. 264, L. 1955.

Compiler's Note

This section was amended twice in the 1955 Session. Once by chapter 215, effective March 5, 1955 and once by chapter 264, effective March 10, 1955. Neither of the chapters made mention of the other

amendment in the Session, but since the acts do not appear to be in irreconcilable conflict the compiler has made a composite section out of the two amendments, carrying the changes made by each amendment.

Collateral References

Hospitals \$3. 41 C.J.S. Hospitals § 5.

- 69-3004. General powers and duties. In carrying out the purposes of the act, the board is authorized and directed:
- (a) To require such reports, make such inspections and investigations and prescribe such regulations as it deems necessary:
- (b) To provide such methods of administration, appoint a director and other personnel and take such other action as may be necessary to comply with the requirements of the federal act and the regulations thereunder;
- (c) To procure in its discretion the temporary or intermittent services of experts or consultants, or organizations thereof, by contract, when such services are to be performed on a part-time or fee-for-service basis and do not involve the performance of administrative duties;
- (d) To the extent that it considers desirable to effectuate the purposes of this act, to enter into agreements for the utilization of the facilities and services of other departments, agencies, and institutions, public or private;
- (e) To accept on behalf of the state and to deposit with the state treasurer any grant, gift or contribution made to assist in meeting the

cost of carrying out the purposes of this act, and to expend the same for such purpose;

(f) To make an annual report to the governor on activities and expenditures pursuant to this act, including recommendations for such additional legislation as the board considers appropriate to furnish adequate hospital and medical facilities to the people of this state.

History: En. Sec. 4, Ch. 270, L. 1947; amd. Sec. 3, Ch. 215, L. 1955; amd. Sec. 23, Ch. 264, L. 1955.

Compiler's Note

This section was amended twice in the 1955 Session. Once by chapter 215, effective March 5, 1955 and once by chapter

264, effective March 10, 1955. Neither chapter made mention of the other amendment in the Session, but since the acts do not appear to be in irreconcilable conflict, the compiler has made a composite section out of the two amendments, carrying the changes made by each amendment.

69-3005. Repealed—Chapter 78, Laws of 1953.

Repeal

This section (Sec. 5, Ch. 270, L. 1947), relating to the appointment of an advisory hospital council to advise and consult with

the state board of health in carrying out the administration of the Hospital Survey and Construction Act, was repealed by Sec. 2, Ch. 78, Laws 1953.

69-3006. Survey and planning activities. The board is authorized and directed to make an inventory of existing hospitals and medical facilities, including public, nonprofit and proprietary hospitals and medical facilities, to survey the need for construction of hospitals and medical facilities, and, on the basis of such inventory and survey, to develop a program for the construction of such public and other nonprofit hospitals and medical facilities as will, in conjunction with existing facilities, afford the necessary physical facilities for furnishing adequate hospital and medical facilities to all the people of the state.

History: En. Sec. 7, Ch. 270, L. 1947; amd. Sec. 4, Ch. 215, L. 1955.

69-3007. Construction program. The construction program shall provide, in accordance with regulations prescribed under the federal act, for adequate hospital facilities and medical facilities for the people residing in this state and in so far as possible shall provide for their distribution throughout the state in such manner as to make all types of hospital and medical facilities services reasonably accessible to all persons in the state.

History: En. Sec. 8, Ch. 270, L. 1947; amd. Sec. 5, Ch. 215, L. 1955.

69-3008. Application for federal funds for survey and planning—expenditure. The board is authorized to make application to the surgeon general for federal funds to assist in carrying out the survey and planning activities herein provided. Such funds shall be deposited in the state treasury and shall be available to the board for expenditure for carrying out the purposes of this part. Any such funds received and not expended for such purposes shall be repaid to the treasury of the United States.

History: En. Sec. 9, Ch. 270, L. 1947.

69-3009. State plan. The board shall prepare and submit to the surgeon general a state plan which shall include the hospital and medical

facilities construction program developed under sections 69-3006 to 69-3008 and which shall provide for the establishment, administration, and operation of hospital and medical facilities construction activities in accordance with the requirements of the federal act and regulations thereunder. The board shall, prior to the submission of such plan to the surgeon general, give adequate publicity to a general description of all the provisions proposed to be included therein, and hold a public hearing at which all persons or organizations with a legitimate interest in such plan may be given an opportunity to express their views. After approval of the plan by the surgeon general, the board shall publish a general description of the provisions thereof in three (3) successive publications at intervals of one (1) week between publications in at least one newspaper having general circulation in each county in the state, and in five (5) papers having a general circulation throughout the state, and shall make the plan, or a copy thereof, available upon request to all interested persons or organizations. The board shall from time to time review the hospital and medical facilities construction program and submit to the surgeon general any modifications thereof which he may find necessary and may submit to the surgeon general such modifications of the state plan, not inconsistent with the requirements of the federal act, as he may deem advisable.

History: En. Sec. 10, Ch. 270, L. 1947; amd. Sec. 6, Ch. 215, L. 1955.

69-3010. Minimum standards for hospital and medical facilities maintenance and operation. The board shall by regulation prescribe minimum standards for the maintenance and operation of hospitals and medical facilities which receive federal aid for construction under the state plan.

History: En. Sec. 11, Ch. 270, L. 1947; amd. Sec. 7, Ch. 215, L. 1955.

69-3011. Priority of projects. The state plan shall set forth the relative need for the several projects included in the construction program determined in accordance with regulations prescribed pursuant to the federal act, and provide for the construction, in so far as financial resources available therefor and for maintenance and operations make possible, in the order of such relative need.

History: En. Sec. 12, Ch. 270, L. 1947.

69-3012. Construction projects—applications. Applications for hospital and medical facilities construction projects for which federal funds are requested shall be submitted to the board and may be submitted by the state or any political subdivision thereof or by any public or nonprofit agency authorized to construct and operate a hospital or a medical facility. Each application for a construction project shall conform to federal and state requirements.

History: En. Sec. 13, Ch. 270, L. 1947; amd. Sec. 8, Ch. 215, L. 1955.

69-3013. Consideration and forwarding of applications. The board shall afford to every applicant for a construction project an opportunity for

a fair hearing. If the board, after affording reasonable opportunity for development and presentation of applications in the order of relative need, finds that a project application complies with the requirements of section 69-3012 and is otherwise in conformity with the state plan, he shall approve such application and shall recommend and forward it to surgeon general.

History: En. Sec. 14, Ch. 270, L. 1947.

69-3014. Inspection of projects. From time to time the board shall inspect each construction project approved by the surgeon general, and, if the inspection so warrants, the board shall certify to the surgeon general that work has been performed upon the project, or purchases have been made, in accordance with the approved plans and specifications, and that payment of an installment of federal funds is due to the applicant.

History: En. Sec. 15, Ch. 270, L. 1947.

69-3015. Hospital and medical facilities construction fund. The board is hereby authorized to receive federal funds in behalf of, and transmit them to, such applicants. There is hereby established, separate and apart from all public moneys and funds of this state, a hospital and medical facilities construction fund. Money received from the federal government for a construction project approved by the surgeon general shall be deposited to the credit of this fund and shall be used solely for payments due applicants for work performed, or purchases made, in carrying out approved projects. Claims for all payments from the hospital and medical facilities construction fund shall, if approved by the board, bear the signature of the executive officer (secretary) of the board, or in his absence, the director.

History: En. Sec. 16, Ch. 270, L. 1947; amd. Sec. 9, Ch. 215, L. 1955.

69-3016. Consolidated applications by two or more counties. Any two (2) or more counties of this state may, by concurrent action of their respective boards of county commissioners, join in a consolidated application for funds for construction (and operation and maintenance when permitted) under the terms of this act of a single hospital, medical facility or health center for all of the counties so joining, such hospital, medical facility or health center to be located at such point within the exterior boundaries of the joining counties as may best serve the people of all the counties involved, and any laws of this state investing any county with power to construct, maintain and operate hospitals or medical facilities directly, or by lease or contract, may be utilized for joint action by any two or more counties, provided, however, that in all cases, the provisions of all laws governing submission of questions of establishment of such a hospital or medical facility, hospital or medical facilities construction, issuance of bonds therefor, and method of operation, and requiring majority vote of the taxpavers at elections on such questions in a county shall apply to and govern consolidated applications and concurrent and joint actions of two or more counties and a majority of the qualified voters in an election common to each county, in each one of the joining counties, shall be required to authorize the issuance of bonds, construction and contracts under such joint or consolidated plan.

History: En. Sec. 17, Ch. 270, L. 1947; amd. Sec. 10, Ch. 215, L. 1955.

69-3017. Severability. If any provision of this act or the application thereof to any person or circumstances shall be held invalid, such invalidity shall not effect [affect] the provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of the act are declared to be severable.

History: En. Sec. 18, Ch. 270, L. 1947.

Compiler's Note

The bracketed word "affect" was inserted by the compiler.

69-3018. State and federal participation in hospital and medical facilities construction. The state of Montana is hereby authorized and empowered to participate jointly with the federal government on a dollar for dollar basis in carrying out a program of hospital and medical facilities construction in accordance with the provisions of sections 69-3001 to 69-3017 and the provisions of the Federal Hospital and Medical Facilities Survey and Construction Act (Title VI of the Public Health Service Act (42 U. S. C. 291 et seq.) as now and hereafter amended), and to allocate and expend money for that purpose in cases where the appropriations of money heretofore or hereafter made by the federal government under said federal act to the state of Montana are inadequate to meet the amounts needed for hospital and medical facilities construction as such needs may be determined from time to time under this act. Provided however, that any funds remaining unused for a consecutive period of two (2) years shall revert to the general fund.

History: En. Sec. 1, Ch. 105, L. 1949; amd. Sec. 11, Ch. 215, L. 1955.

Collateral References
Hospitals©~2.
41 C.J.S. Hospitals § 4.

CHAPTER 31

CESSPOOLS, SEPTIC TANKS, PRIVIES AND SEWAGE LAGOONS

Section 69-3101. Purpose of act-supplemental to existing laws.

69-3102. License required.

69-3103. Application for license—issuance—numbering—fee—suspension or revocation.

69-3104. Vehicles of licensee-marking.

69-3105. Permit from local health officer—examination—fee.

69-3106. Regulations-enforcement.

69-3107. Violation of act-penalty-exception from act.

69-3108. Purpose of act to control open sewage lagoons and cesspools.

69-3109. Investigation and report of open lagoons and cesspools—rules and regulations.

69-3110. Notice to owners of corrective measures required—time allowed for compliance.

69-3111. Report of noncompliance to county attorney-enforcement.

69-3112. Noncompliance as nuisance—injunction—penalties.

69-3101. Purpose of act—supplemental to existing laws. This act is in exercise of the police powers of the state for the protection of the safety,

health and welfare of the people of the state. It is hereby found and declared that the public welfare requires control and regulation of the operators engaged in the business of cleaning cesspools, septic tanks or privies in order to prevent or eliminate unsanitary and unhealthful practices and conditions which endanger public health, social well-being and safety of the state and all its people. This act is intended to be supplemental to existing state, county and city health laws and nothing herein contained shall be construed to limit the application of or to repeal any such existing health laws.

History: En. Sec. 1, Ch. 154, L. 1951.

69-3102. License required. It is unlawful for any person, persons, partnership, firm, or corporation to engage in the business for hire of cleaning cesspools, septic tanks or privies unless he or it shall be the holder of an unrevoked license to engage in such business issued by the state board of health as hereinafter provided.

History: En. Sec. 2, Ch. 154, L. 1951.

Collateral References Licenses©11(1). 53 C.J.S. Licenses § 30.

Application for license—issuance—numbering—fee—suspension or revocation. Any person, persons, partnership, firm, or corporation in the business of cleaning cesspools, septic tanks, or privies, after the effective date of this act shall be required to make application to the state board of health for a license to engage in such business. All applications for licenses under this act shall be kept in the files of the state board of health. The application shall state the name in full, if a partnership the names of each of the partners; the place of business, and place of residence of the applicant for license and of each of the partners in the business, if a partnership. The application shall state the number of units and type of equipment to be operated by him or them under the provisions of this act. The application shall contain a statement that the applicant agrees to comply with the rules and regulations of the state board of health and with the provisions of this act. The application shall be signed by the individual, authorized officer of a corporation, if a corporation; or by the managing partner, if a partnership. Upon receipt of proper application and fee, the state board of health shall issue a license to the applicant as a "Montana Sanitary Licensee." Each license so issued shall be numbered consecutively beginning with number ten (10). The fee for such license shall be five dollars (\$5.00) each calendar year or part thereof and renewable on January 1st of each year. Such license shall not be transferable to any person, persons, partnership, firm or corporation other than that to whom originally issued. Only a person who complies with the requirements of this act and the rules and regulations of the state board of health shall be entitled to receive and retain such a license. Such a license may be suspended or revoked by the state board of health for the violation by the holder of any of the rules and regulations of the state board of health or the provisions of this act.

History: En. Sec. 3, Ch. 154, L. 1951.

69-3104. Vehicles of licensee—marking. Any person, persons, partnership, firm or corporation licensed under this act shall be required to paint on the side of any vehicle which he or it uses in such business the words "Montana Sanitary Licensee" and immediately under these words he or it shall paint "License No.———" and shall paint the number of his license in the space so provided with letters and numbers at least one and one-half $(1\frac{1}{2})$ inches high; and all lettering and numbering shall be in distinct color contrast with its background.

History: En. Sec. 4, Ch. 154, L. 1951.

Permit from local health officer—examination—fee. after the effective date of this act every "Montana Sanitary Licensee" who desires to clean any cesspool, septic tank, or privy shall secure from the city, town or county or district health officer having jurisdiction, a permit for cleaning each such cesspool, septic tank or privy. A permit shall be issued only after a satisfactory examination by the health officer or his duly authorized representative covering the equipment to be used, the applicant's knowledge of sanitary principles and the laws and ordinances concerning nuisances or affecting human health; and the reliability of the applicant in observing sanitary laws, ordinances and directions, and in selecting laborers and employees who may clean out septic tanks, cesspools, and privies without endangering human health or safety and only after examination of the place or places and manner of disposal of the cleanings proposed by said applicant. The said permit shall contain the name of the applicant, the specific date of cleaning, the name and address of owner of the cesspool, septic tank, or privy, and the exact place and means of disposing of the waste. The fee for each such permit shall be one dollar (\$1.00), and the issued permit is valid only for the specific time, place, and person, persons, firm or corporation specified in the permit.

History: En. Sec. 5, Ch. 154, L. 1951.

69-3106. Regulations—enforcement. The state board of health shall make all necessary rules and regulations for carrying out the provision of this act. The state board of health, or any authorized representative thereof, the district, county, city or town health officer issuing any permit shall be charged with the enforcement of the provisions of this act.

History: En. Sec. 6, Ch. 154, L. 1951.

69-3107. Violation of act—penalty—exception from act. Violation of any of the provisions of this act or of any order or orders of a health officer made pursuant to this act for the protection of human health and comfort shall constitute a misdemeanor and shall be punishable by a fine of not more than one hundred dollars (\$100.00) for each offense or by imprisonment for not more than thirty (30) days or by both such fine and imprisonment. Any fines so collected shall be deposited in the general fund of the county in which action is brought. The license and permit provisions of this act shall not be construed to apply to any city, town or county who desires to clean septic tanks, cesspools or privies publicly owned or controlled by them. The said city, town or county shall be required to comply

with the state board of health rules and regulations on the cleaning of cesspools, septic tanks or privies as provided for in this act.

History: En. Sec. 7, Ch. 154, L. 1951.

69-3108. Purpose of act to control open sewage lagoons and cesspools. The legislative assembly declares that the proper control of open sewage lagoons and cesspools, servicing the disposal of sewage and waste in areas where the presence of children or the attractiveness of the areas to children make them dangerous to the lives of children is affected with a public interest. The purpose of this act is to prevent the drownings of children in unfenced, uncovered and open sewage lagoons and cesspools, in inhabited areas. This act shall be deemed an exercise of the police power of the state of Montana in and for the protection of the welfare, health, peace and safety of the people of Montana.

History: En. Sec. 1, Ch. 203, L. 1961.

69-3109. Investigation and report of open lagoons and cesspools—rules and regulations. It shall be the duty of the county sheriffs to investigate all open sewage lagoons and cesspools in inhabited areas within their respective counties and to report their findings with recommendations as to future corrective procedures to their board of county commissioners; thereupon it shall be the duty of the board of county commissioners of the county to promulgate such rules, regulations and orders in each particular case, as in their respective discretions, they deem adequate to eliminate the danger of drowning of children by any uncovered and unprotected sewage lagoon or cesspool in inhabited areas within their counties.

History: En. Sec. 2, Ch. 203, L. 1961.

69-3110. Notice to owners of corrective measures required—time allowed for compliance. After it has been determined what corrective measures, if any, are necessary to protect the public from open lagoons and cesspools, the board of county commissioners of the county shall cause notice to be served by the sheriff, either personally or by certified mail, upon any owner or owners of said sewer lagoons or cesspools. Said owner or owners shall be given sixty (60) days after receipt of notice within which to comply with the board of county commissioners' rules, orders and regulations respecting enclosing or fencing said lagoons or cesspools; in the event more than sixty (60) days are needed by the owner or owners of lagoons or cesspools to comply with such order, the board of county commissioners may, upon application of said owner or owners, extend the time in which said owner or owners must comply.

History: En. Sec. 3, Ch. 203, L. 1961.

69-3111. Report of noncompliance to county attorney—enforcement. It shall be the duty of the board of county commissioners to submit the name or names of any owner or owners not complying with the provisions of this act to the county attorney of said county where the noncompliance offense has occurred and thereupon the county attorney shall take the necessary legal action to enforce the provisions of this act.

History: En. Sec. 4, Ch. 203, L. 1961.

69-3112. Noncompliance as nuisance—injunction—penalties. Any person, partnership, association, company, corporation or other group that does not take the necessary precautionary measures as directed and ordered by the board of county commissioners shall be guilty of committing a public nuisance. Such act may be enjoined in an action instituted and prosecuted by the county attorney. Violation of any provision of this act will subject said offending owner or owners, to a fine of not more than five hundred dollars (\$500) or imprisonment not to exceed six (6) months in the county jail, or both.

History: En. Sec. 5, Ch. 203, L. 1961.

CHAPTER 32

STATE BOARD OF HEALTH—MATERNAL AND CHILD HEALTH SERVICES
—EDUCATIVE PROGRAM—SCHOOL NURSES—SUPERVISION BY BOARD
—AUTHORITY OF COUNTIES AND SCHOOL BOARDS—SERVICES
FOR CRIPPLED CHILDREN—EDUCATION FOR CHILDREN
AND ADULTS IN USE AND ABUSE OF NARCOTICS

Section 69-3201. Maternal and child health protection—health education program.

69-3202. School nurses—county nurses—supervision—rules and regulations.

69-3203. Services for crippled children.

69-3204. Narcotic education.

69-3205. Appointment of personnel to execute function and activities, under Chapter 32, Title 69, Revised Codes, 1947.

69-3201. Maternal and child health protection—health education program. The state board of health is hereby authorized and directed to continue to develop and administer a program for the better protection of the health of mothers and children in the state, pursuant to the purposes of the program inaugurated by the state of Montana by chapter 121, Laws of 1917. The board shall make and enforce sanitary and hygienic regulations designed to promote the health and well-being of mothers and children; it shall carry on continuously a campaign of health education in their interest; and it shall take all reasonable and proper measures for the effective protection of the health of mothers and children; however, nothing in this act shall be construed or operate so as to interfere in any way with the exercise of the child's or parent's religious belief, as to the examination for or in the treatment of diseases; provided, that quarantine regulations relating to contagious or infectious diseases are not infringed upon.

History: En. 69-3201 by Sec. 24, Ch. 264, L. 1955.

Compiler's Notes

Section 24 of Ch. 264, Laws 1955 contained a preliminary clause which read "Section 24. That there is hereby added an additional Chapter to and under Title 69, "Public Health and Safety," Revised Codes of Montana, 1947, to be numbered Chapter 32, under said Title 69, said Chapter 32 to be entitled, "State Board of Health—Maternal and Child Health Serv-

ices—Educative Program—School Nurses—Supervision by Board—Authority of Counties and School Boards—Services for Crippled Children—Education for Children and Adults in Use and Abuse of Narcotics" and to contain five (5) sections numbered, successively, as sections 69-3201, 69-3202, 69-3203, 69-3204, and 69-3205, Revised Codes of Montana, 1947, as follows:"

Chapter 121, Laws of 1917, referred to in this section, was repealed by Sec. 28, Ch. 264, Laws 1955.

69-3202. School nurses—county nurses—supervision—rules and regulations. (a) School boards may employ, in their discretion, regularly quali-

fied nurses, duly registered in the state of Montana, to act as school nurses. In sparsely settled communities two (2) or more school boards may unite and employ a school nurse, the salary of such nurse being paid pro rata according to the assessed valuation in the school districts.

- (b) County commissioners are hereby authorized at such time as they deem necessary, to employ regularly qualified nurses, to be known as county nurses, for duties pertaining to maternal and child health.
- (c) The state board of health is hereby constituted the agency of the state of Montana to supervise and regulate school, county and public health nurses in the performance of their duties under all such employments; and the board shall make, publish, and from time to time, revise and amend, as necessary, and, at all times, enforce suitable rules and regulations governing the qualifications and professional activities, duties, services and administrations of school, county and public health nurses, as such, and all such regulations when properly adopted, properly identified and reasonably adequate to protect public health, shall have the force of law. In formulating such rules and regulations, and in its supervisory functions, the board shall consult with the state superintendent of public instruction, with respect to health measures in the schools and the board shall cooperate generally with school boards, and with city, county and local boards of health, in all such matters, and it shall instruct and encourage all such nurses on all matters of school or public health.
- (d) The board shall cause to be prepared and distributed to the school, county and public health nurses all necessary report forms and blanks, and it shall be the duty of all such nurses to execute such forms and blanks promptly, informatively and accurately, in compliance with the board's requirements.

History: En. 69-3202 by Sec. 24, Ch. 264, L. 1955.

69-3203. Services for crippled children. The state board of health is hereby authorized and directed to develop and administer a program for services to crippled children, which shall have for its purpose, as far as practicable under the conditions existing in the state of Montana, to supply, extend and improve the services designated by this act for crippled children in the state of Montana. These services shall consist of locating such children and providing diagnosis, medical, surgical and corrective treatment, after-care and related services for children who are crippled, or who are suffering from conditions which lead to crippling; and the board may, in its discretion, within the limits of its funds, provide services for children who are afflicted with or suffering from rheumatic fever, or heart diseases, and who are totally incapacitated for education or for remunerative occupation. Special attention shall be given to this program in rural areas and in areas suffering from severe economic distress. The board shall do all things that are necessary to carry out this program, in so far as means are available and conditions in this state justify, and shall proceed in conformity with the Social Security Act of the United States, rules and regulations promulgated by the United States children's bureau, and the statutes of the state of Montana.

History: En. 69-3203 by Sec. 24, Ch. 264, L. 1955.

NOTE.—The Social Security Act, referred to in this section, will be found in the United States Code, Title 42, sec. 301 et seq.

- 69-3204. Narcotic education. (a) The state board of health is hereby authorized and directed to establish and administer as part of its public health education activities, a program of narcotic education, whereby it shall carry to the general public and to and in all educational institutions in Montana, from the elementary school through the institutions of higher learning, the scientific facts concerning narcotic drugs, their use and abuse.
- (b) The state board of health is authorized and hereby empowered to appoint and employ a health educational consultant with special training in narcotic education to carry out the provisions of this act, who shall be under the merit system and whose educational qualifications shall meet merit system requirements of other health education consultants.

History: En. 69-3204 by Sec. 24, Ch. 264, L. 1955.

Appointment of personnel to execute function and activities, 69-3205. under Chapter 32, Title 69, Revised Codes, 1947. The state board of health shall appoint and employ such personnel as are necessary to carry out and execute effectively the functions, activities, and the duties and responsibilities with which the board is charged under this Chapter 32, Title 69, added hereby to said title of the Revised Codes of Montana, 1947, in (a) the field of maternal and child health, including the supervision of nurses emploved by the state, cities, counties, and by school boards, (b) in the field of services for crippled children, and (c) in the field of narcotic education, including such technically qualified or technically trained, and competent personnel as may be required for each of such fields, within the limits of appropriations by the legislative assembly, or within the limits of grants and allowances from the United States, or of contributions, donations, and gifts from philanthropic foundations, corporate or otherwise, or from any other donors for any of such purposes. The acceptance of such contributions, donations and gifts, and the use of the funds derived therefrom by the state board of health is hereby authorized. The state board of health and the state department of public welfare shall carefully coordinate their respective services to avoid any conflict or duplication.

History: En. 69-3205 by Sec. 24, Ch. 264, L. 1955.

69-3305.

CHAPTER 33

GEOPHYSICAL EXPLORATION

Section 69-3301. Persons required to comply with act.

69-3302. Deemed doing business within state—resident agent.

69-3303. Filing of notice of intention to engage in geophysical exploration.
69-3304. Surety bond required—amount—filing—proper plugging and restoration of surface—certificate of filing.

Issuance of geophysical exploration permit—requirements—contents

-period valid for-costs-carrying of permit.

69-3306. Duty to file record showing where work performed—time for—request to file location of shotpoint and date fired—complaint of property owners.

69-3307. Duty of county attorneys to enforce act. 69-3308. Failure to comply with act—misdemeanor.

69-3301. Persons required to comply with act. A person, firm or corporation operating individually or through agents within the state of Montana for the purpose of geophysical exploration, in which exploration the seismograph is utilized along with explosives for the determination of geophysical data for any purpose whatsoever, and which person, firm or corporation either through its own employees or by hiring the services of others operates "seismograph crews," as the term is generally known, shall comply with the following provisions of this act; provided, however, that compliance with the provisions of this act by a seismograph crew or its employer shall constitute compliance herewith by that person, firm or corporation who has engaged the services of such crew or its employer as an independent contractor in so far as the geophysical operations of such crew are concerned.

History: En. Sec. 1, Ch. 235, L. 1955.

69-3302. Deemed doing business within state—resident agent. A person, firm or corporation shall be deemed to be doing business within the state of Montana when engaged in such geophysical exploration, within the boundaries of this state, and shall, if not already qualified to do business within this state with a designation of an agent within the state for service of process, prior to such time, file with the secretary of state of the state of Montana an authorization, which authorization shall designate a resident agent for the service of process in any action which may be pending in a court in this state, which cause of action may have arisen out of such geophysical exploration.

History: En. Sec. 2, Ch. 235, L. 1955.

69-3303. Filing of notice of intention to engage in geophysical exploration. It shall be necessary for any person, firm or corporation desiring to engage in such geophysical exploration within the state of Montana, prior to actually so engaging in such exploration, to file a notice of intention to engage in such geophysical exploration with the county clerk and recorder in each county in which exploration is to be carried on, or engaged in. The said notice of intention to engage in such geophysical exploration shall be filed prior to the actual commencement of such geophysical exploration.

History: En. Sec. 3, Ch. 235, L. 1955.

69-3304. Surety bond required—amount—filing—proper plugging and restoration of surface—certificate of filing. A person, firm or corporation desiring to engage in such geophysical exploration, shall also file with the secretary of state a good and sufficient surety bond in the amount of ten thousand dollars (\$10,000.00) for a single such geophysical crew or a blanket surety bond in the amount of twenty-five thousand dollars (\$25,000.00) for all such geophysical crews operating within the state for such person, firm or corporation, which bond shall indemnify the owners of property within this state against such physical damages to such prop-

erty as may arise as the result of such geophysical exploration. Unless otherwise agreed as between the owner of the surface and such person, firm, or corporation, it shall be the obligation of such person, firm, or corporation upon completion of exploration to plug all "shot holes" and restore the surface around the same as near as practicable to its original condition. The said bond shall remain on file with the secretary of state so long as the exploration is carried on or engaged in, plus an additional two (2) years thereafter; provided, however, that the aggregate liability of the surety shall, in no event, exceed the amount of said bond. Upon the filing of such bond, said secretary of state shall issue to the person, firm or corporation a certificate showing that such bond has been filed and showing the name of the designated resident agent within the state for service of process for such person, firm or corporation.

History: En. Sec. 4, Ch. 235, L. 1955; amd. Sec. 1, Ch. 175, L. 1961.

69-3305. Issuance of geophysical exploration permit—requirements contents—period valid for—costs—carrying of permit. The county clerk and recorder of each county in the state of Montana, upon compliance with the provisions herein contained, namely the filing of a notice of intention to engage in such geophysical exploration, in addition to a certificate or photostatic copy thereof from the secretary of the state of Montana certifying the name and address of the resident agent for service of process for said person, firm or corporation desiring to engage in such geophysical exploration, and certifying that the required surety bond has been filed with the said secretary of state, shall issue to such person, firm or corporation a "geophysical exploration permit," which permit will show the names of the person, firm or corporation; his or its principal place of business; if a firm or corporation, the names and addresses of its officers; the name and address of the resident agent for service of process for said person, firm or corporation; that a notice of intention to engage in such geophysical exploration has been duly filed; that a good and sufficient surety bond has been filed by the said person, firm or corporation, naming the surety company and giving its address; such permit to be signed by the county clerk and recorder and/or his deputy, and bearing the official county seal. Such permit shall be valid and effective for all such geophysical crews of the permittee during the calendar year in which it is issued. The cost of the said permit shall be five dollars (\$5.00) per calendar year or any portion thereof for which issued, and the revenues realized therefrom shall go to the county so issuing. Such funds as are realized shall be applied toward payment of the cost of printing said permits, which shall be printed at the county seat, and such excesses shall, from year to year, go into the county's general fund; provided, however, that if printed forms are not available at the time any person, firm or corporation desires such permit and qualifies for its issuance, typewritten or other form of reproduction of such permit may be used and the fee of five dollars (\$5.00) shall nevertheless be paid for its issuance and such fee shall be disposed of in the same manner. The said permit or photostatic copy thereof shall be carried by the person, or the agent of the firm or corporation, at all times

during the period of such geophysical exploration and shall be exhibited upon demand by any county or state official.

History: En. Sec. 5, Ch. 235, L. 1955.

69-3306. Duty to file record showing where work performed—time for —request to file location of shotpoint and date fired—complaint of property owners. Within three (3) months from the day any firing of shotpoints in such geophysical exploration is done by any person, firm or corporation within this state, such person, firm or corporation shall file with the county clerk and recorder of the county in which such work was done a record showing each township and range within said county in which such work was performed and the approximate date at which such work was performed. Such person, firm or corporation shall file with said county clerk and recorder a record showing the location of each such shotpoint and date fired within a maximum area of any square, four-section area of land, upon written request therefor by said county clerk and recorder, which request must be based upon the complaint of a property owner that physical damages to such property have arisen by reason of the use of the seismograph and explosives in such geophysical operations at some location within said maximum four-mile square area, and such written notice shall designate the name and address of the complaining person and shall describe the approximate date of the alleged damages and the nature of the alleged damages. The required record of operations in response to such written demand therefor by the county clerk and recorder shall be supplied within ten (10) days from the date on which such written demand is received.

History: En. Sec. 6, Ch. 235, L. 1955.

69-3307. Duty of county attorneys to enforce act. It shall be the duty of the several county attorneys to see that the provisions herein contained are complied with and that this law is enforced.

History: En. Sec. 7, Ch. 235, L. 1955.

69-3308. Failure to comply with act—misdemeanor. A failure to comply with the terms of this act shall be deemed a misdemeanor and shall be punishable as is elsewhere provided in this code, either by fine or imprisonment, or both.

History: En. Sec. 8, Ch. 235, L. 1955.

CHAPTER 34

SANITARIANS

Section 69-3401. Definitions.
69-3402. Sanitarians registration council.
69-3403. Application for registration by examination.
69-3404. Fees.
69-3405. Revocation or suspension.
69-3406. Penalty.
69-3407. Reciprocity.
69-3408. Appeal procedure.
69-3409. Service of process.

69-3401. Definitions. "Board" means the Montana state board of health. "Council" means the sanitarians registration council, hereby created. "Sanitarian" is a person who is trained in physical, biological and sanitary sciences to carry out inspectional and educational duties in the field of environmental sanitation. "Registered sanitarian" is a sanitarian registered in accordance with the provisions of this act. "Certificate of registration" is a document showing the name of a registered sanitarian, the date of issue, serial number, and bearing the signatures of the designated members of the council hereby authorized to grant such certificate and under the seal of said council. "Montana association of sanitarians" means an organization of Montana sanitarians affiliated with the national association of sanitarians. "Montana joint merit council" is an authorized group for screening applicants for state employment.

History: En. Sec. 1, Ch. 174, L. 1959.

69-3402. Sanitarians registration council. A council to be known as the sanitarians registration council is hereby established to consist of three (3) sanitarians appointed by the board. The initial council shall be selected by the board from a list of not less than four (4) qualified and practicing sanitarians whose names shall be submitted to the board by the Montana association of sanitarians at least thirty (30) days prior to the next appointment date. On July 1, 1959, or as soon thereafter as is practicable, the members of the first council shall be appointed. One (1) member shall be a sanitarian employed by the board and shall act as secretary-treasurer. The term of the secretary-treasurer shall be for one (1) year and shall be appointed yearly, thereafter, by the board. One (1) member shall serve two (2) years, one (1) member shall serve three (3) years, and members thereafter shall serve for a period of three (3) years or until qualified successors are appointed. The members of the council shall serve without compensation but shall be reimbursed for their actual and necessary traveling and other expenses while engaged in the business of the council. The council shall, at its first meeting after July 1, 1959, elect from its members a chairman to serve until the first November meeting, and adopt a common seal for the authentication of its orders and records. The members of the council shall meet during the month of November of each year, the first meeting to be in November, 1959, and at such other times and places as the council may determine. The chairman and secretary-treasurer shall have power to administer oaths in examination of applications for certificates, and to witnesses called before the board for the transaction of business under the provisions of this act. The council shall keep a record of all its proceedings and a register disclosing the names, ages, and addresses of all applicants for a certificate, and whether each application was granted or denied. Such register shall constitute prima-facie evidence of all matters therein entered. The council shall accept applications for registration, grant or deny the same, order and conduct hearings upon applications when it determines in its discretion such hearings are necessary, issue certificates to persons granted registration, order and conduct hearings to revoke or suspend registration, adopt such rules and regulations

not inconsistent with this act as it determines are necessary and proper for its function and administration, and not inconsistent with the board.

History: En. Sec. 2, Ch. 174, L. 1959.

Application for registration by examination. Any person, upon the payment of the fees prescribed herein, may apply to the council for registration on forms provided for that purpose. Each applicant shall submit evidence and prove to the satisfaction of the council that he meets one of the following qualifications for registration hereunder. he or she has qualified, as required by the board and the joint merit council, and successfully passed the examination for sanitarian 1 or higher. (b) That he or she was a resident of the state of Montana for one (1) year immediately preceding the passage and approval of this act and that he or she was engaged as a professional sanitarian in the state of Montana for one (1) year immediately preceding July 1, 1959, providing that registration shall not be granted under this subsection unless the application therefor is filed with the council within one (1) year after the passage and approval of this act. (c) The council shall issue a certificate of registration to all applicants who meet the above qualifications. (d) An applicant for examination may, in the discretion of the council, be given a temporary certificate to practice as a registered sanitarian prior to taking the examination. The term of such certificate shall not exceed one (1) year.

History: En. Sec. 3, Ch. 174, L. 1959. Collateral References 39 C.J.S. Health §25.

69-3404. Fees. Applicants for registration shall pay a fee of twenty dollars (\$20) at the time of making application. A sanitarian registered under the provisions of this act may renew his certificate by paying an annual fee as set by the board, but not to exceed ten dollars (\$10). All fees collected shall be paid to the board of health and held in a special fund and shall be used to defray the cost of administration of this act in accordance with a budget developed by the council and the board. All fees shall be due and payable on or before the first day of July for the current year for which the renewal certificate shall be issued. All certificates shall expire on the renewal date unless renewed prior to such date. Registrations which have lapsed for failure to pay renewal fees may be reinstated under regulations adopted by the council.

History: En. Sec. 4, Ch. 174, L. 1959.

69-3405. Revocation or suspension. The council shall have the power to revoke or suspend the certificate of registration of any registrant for unprofessional conduct or the practice of any fraud or deceit in obtaining registration, or any gross negligence, incompetency or misconduct in the practice of professional sanitation, or upon the conviction of any crime involving moral turpitude, provided, however, that no revocation of certificate shall become effective until after a hearing, duly noticed, is held and the registrant given the opportunity to appear in person or by counsel and to answer the charges which have been filed against him with the

council and to produce evidence and witnesses on his behalf and to cross-examine witnesses.

History: En. Sec. 5, Ch. 174, L. 1959.

69-3406. Penalty. After January 1, 1960, no person shall offer his services as a sanitarian or use, assume, or advertise in any way, any title, or description tending to convey the impression that he is a sanitarian unless he is a holder of a current certificate of registration as provided in this act. A holder of a current certificate is entitled to append to his name the letters "R. S." Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars (\$25) nor more than two hundred dollars (\$200), or imprisonment in the county jail for not less than ten (10) days nor more than ninety (90) days, or both. The district court shall have jurisdiction of all prosecutions brought under this act.

History: En. Sec. 6, Ch. 174, L. 1959.

69-3407. Reciprocity. The council shall issue a certificate of registration without examination to any person who makes application on forms prescribed and furnished by the council, pays the registration fee of twenty dollars (\$20) and submits satisfactory proof that: (1) he is of good moral character; (2) he is registered as a sanitarian in a state in which the qualifications for registration are not lower than the qualifications for registration in this state at the time he applies for registration.

History: En. Sec. 7, Ch. 174, L. 1959.

69-3408. Appeal procedure. Any party aggrieved by any decision or act of the council may seek a review thereof in the district court of the first judicial district of the state of Montana in the manner set forth in sections 93-9001 to 93-9011, and said court shall affirm, reverse, or modify the findings of said board in accordance with law.

History: En. Sec. 8, Ch. 174, L. 1959.

69-3409. Service of process. When any petition or complaint is filed in any court naming the Montana sanitarians registration council as a party, process may be served upon the said council by delivering to and leaving with the secretary-treasurer of said council a true copy of the summons, writ, or order, as the case may be, and a true copy of the complaint, petition, or application upon which such summons, writ, or order was based.

History: En. Sec. 9, Ch. 174, L. 1959.

CHAPTER 35

MOTORBOAT AND VESSEL REGULATION

Section 69-3501. Declaration of policy.

69-3502. Definitions.

69-3503. Operation of unnumbered motorboats or vessels prohibited.

69-3504. Identification number.

69-3505. Equipment.

Exemption from numbering provisions of this act. 69-3506

69-3507. Boat liveries.

69-3508. Prohibited operation.

69-3509. Right of way.

69-3510. Restricted areas. 69-3511. Overloading and overpowering.

69-3512. Collisions, accidents and casualties.

69-3513. Transmittal of information.

69-3514. Water-skis and surfboards. 69-3515. Owner's civil liability.

69-3516. Filing of regulations.

69-3517. Enforcement of act.

69-3518. Penalty.

69-3501. Declaration of policy. It is the policy of this state to promote safety for persons and property in and connected with the use, operation and equipment of vessels and to promote uniformity of laws relating thereto.

History: En. Sec. 1, Ch. 285, L. 1959.

69-3502. Definitions. As used in this act, unless the context clearly requires a different meaning:

- (1) "Vessel": for purposes of registration "vessel" shall mean those watercraft described under section 3 of public law 85-911, H. R. 11078 unless otherwise defined by the fish and game commission of the state of Montana[;] as pertains to the safety regulations of this act "vessel" means every description of watercraft other than a seaplane on the water capable of being used as a means of transportation on water.
- (2) "Motorboat" means any vessel propelled by machinery, whether or not such machinery is the principal source of propulsion, but shall not include a vessel which has a valid marine document issued by the bureau of customs of the United States government or any federal agency successor thereto.
- "Owner" means a person, other than a lien holder, having the property in or title to a motorboat or vessel. The term includes a person entitled to the use or possession of a motorboat or vessel subject to an interest in another person, reserved or created by agreement and securing payment or performance of an obligation, but the term excludes a lessee under a lease not intended as security.
- "Waters of this state" means any waters within the territorial (4)limits of this state.
- "Person" means an individual, partnership, firm, corporation, association or other entity.
- "Operate" means to navigate or otherwise use a motorboat or a vessel.
- The word "board" shall mean the fish and game commission of the state of Montana.

History: En. Sec. 2, Ch. 285, L. 1959.

NOTE.—Section 3 of public law 85-911, H. R. 11078, referred to in this section, will be found in United States Code, Tit. 46, sec. 527a.

Compiler's Note

The bracketed semicolon was inserted by the compiler.

69-3503. Operation of unnumbered motorboats or vessels prohibited. Every motorboat or vessel on the waters of this state propelled by machinery of more than ten horsepower shall be numbered. No person shall operate or give permission for the operation of any motorboat or vessel on such waters unless the motorboat or vessel is numbered in accordance with this act, or in accordance with applicable federal law, or in accordance with a federally approved numbering system of another state, unless (1) the certificate of number awarded to such motorboat or vessel is in full force and effect, and (2) the identifying number set forth in the certificate of number is displayed on such motorboat or vessel.

History: En. Sec. 3, Ch. 285, L. 1959.

- 69-3504. Identification number. (a) The owner of each motorboat or vessel requiring numbering by this state shall file an application for number, accompanied by a certificate of tax of personal property showing payment of tax on the motorboat or vessel for the current year, with the board or its designated representative, on forms approved by the board. The application shall be signed by the owner of the motorboat or vessel, and shall be accompanied by a fee of three (\$3.00) dollars. Upon receipt of the application in approved form and certificate hereinabove referred to, the board shall enter the same upon the records of its office and issue to the applicant a certificate of number stating the number awarded to the motorboat or vessel and the name and address of the owner. The owner shall paint on or attach to each side of the bow of the motorboat or vessel, the identification number in such manner as may be prescribed by rules and regulations of the board, in order that it may be clearly visible. The number shall be maintained in legible condition. The certificate of number shall be pocket size and shall be available at all times for inspection on the motorboat or vessel for which issued, whenever such motorboat or vessel is in operation.
- (b) The numbering requirements of this act shall apply to motor-boats or vessels operated by manufacturers or dealers except that the description of the motorboat or vessel shall be omitted from the certificate of number and such number shall be permitted to be transferred from one vessel to another. In lieu of the descriptive material on said certificate of number the word "manufacturer" or "dealer" as appropriate, will appear on said certificate. The manufacturer or dealer may have the number awarded printed upon or attached to a removable sign or signs to be temporarily but firmly mounted upon or attached to a vessel to be demonstrated or tested so long as the number is exhibited so as to in all other respects meet the requirements of act relating to display of numbers.
- (c) The owner of any motorboat or vessel already covered by a number in full force and effect, which has been awarded to it pursuant to then operative federal law or a federally approved numbering system of another state, shall record the number prior to operating the motorboat or vessel on the waters of this state in excess of the ninety day reciprocity period provided for in section 69-3506(1). Such recordation shall be in the manner and pursuant to the procedure required for the award of number under

subsection (a) of this section, except that no additional or substitute number shall be issued.

- (d) Should the ownership of a motorboat or vessel change, a new application form with fee shall be filed with the board and a new certificate of number shall be awarded in the same manner as provided for in an original award of number, provided further that the number assigned may be determined by the board.
- (e) In the event that an agency of the United States government shall have in force an over-all system of identification numbering for motorboats or vessels within the United States, the numbering system employed pursuant to this act by the board shall be in conformity therewith.
- (f) The board may award any certificate of number directly or may authorize any person to act as agent for the awarding thereof. In the event that a person accepts such authorization, he may be assigned a block of numbers and certificates therefor which upon award, in conformity with this act and with any rules and regulations of the board shall be valid as if awarded directly by the board.
- (g) All records of the board made or kept pursuant to this act shall be public records; provided that the board shall submit to the registrar of motor vehicles of this state, correct copies of all certificates of registration issued pursuant to this act; and provided further that said registrar shall make said records immediately available to all law enforcement offices of this state.
- (h) Every certificate of number awarded pursuant to this act shall continue in full force and effect for a period not to exceed three years, unless sooner terminated or discontinued in accordance with the provisions of this act. Certificates of number may be renewed by the owner in the same manner provided for in the initial securing of the same. The board shall notify each owner of a registered vessel of expiration of registration a reasonable time prior to expiration of registration.
- (i) The board shall fix a day and month of the year on which certificates of number due to expire during the calendar year shall lapse and no longer be of any force and effect unless renewed pursuant to this act.
- (j) In event of transfer of ownership, the purchaser shall furnish the board notice of the acquisition of all or any part of his interest other than the creation of a security interest in a motorboat or vessel numbered in this state pursuant to subsections (a) and (b) of this section, or of the destruction or abandonment of such motorboat or vessel, within reasonable time thereof. Such transfer, destruction or abandonment shall terminate the certificate of number for such motorboat or vessel except that in the case of a transfer of a part interest which does not affect the owner's right to operate such motorboat or vessel, such transfer shall not terminate the certificate of number.
- (k) Any holder of a certificate of number shall notify the board within reasonable time if his address no longer conforms to the address appearing on the certificate and shall, as a part of such notification, furnish the board with his new address. The board may provide in its rules and regulations for the surrender of the certificate bearing the former address and

its replacement with a certificate bearing the new address or the alteration of an outstanding certificate to show the new address of the holder.

(1) No number other than the number awarded to a motorboat or vessel or granted reciprocity pursuant to this act, shall be painted, attached or otherwise displayed on either side of the bow of such motorboat or vessel.

History: En. Sec. 4, Ch. 285, L. 1959; amd. Sec. 1, Ch. 219, L. 1961.

69-3505. Equipment. Every vessel shall have aboard:

- (1) One life preserver, buoyant vest, ring buoy or buoyant cushion of the type approved by the commandant of the United States coast guard in good and serviceable condition for each person on board, provided, in boats under twenty-six (26) feet in length, that any person or persons, twelve (12) years of age or younger, occupying a vessel while such vessel is in motion, shall have a life preserver of a type approved by the commandant of the United States coast guard securely fastened to his or her person.
- (2) When in operation during hours of darkness, a light sufficient to make the motorboat's or vessel's presence and location known to any and all other vessels within a reasonable distance.
- (3) If carrying or using any inflammable or toxic fluid in any enclosure for any purpose, and if not an entirely open motorboat or vessel, an efficient natural or mechanical ventilation system which shall be capable of removing resulting gases prior to, and during the time such motorboat or vessel is occupied by any person.
- (4) All motorboats shall carry the minimum number of coast guard approved hand portable fire extinguishers, the number of which is to be determined by the Montana fish and game commission or a coast guard approved fixed fire extinguishing system, except, that motorboats less than twenty-six (26) feet in length of open construction, propelled by outboard motors, and not carrying passengers for hire need not carry such portable fire extinguishers or fire extinguishing systems.

History: En. Sec. 5, Ch. 285, L. 1959; amd. Sec. 1, Ch. 138, L. 1961.

69-3506. Exemption from numbering provisions of this act. A motor-boat or vessel shall not be required to be numbered under this act, if it is:

- (1) Already covered by a number in full force and effect which has been awarded to it pursuant to federal law or a federally approved numbering system of another state; provided, that such vessel shall not have been within this state for a period in excess of ninety (90) consecutive days.
- (2) A vessel from a country other than the United States temporarily using the waters of this state.
- (3) A vessel whose owner is the United States, a state or subdivision thereof.
 - (4) A ship's lifeboat.

History: En. Sec. 6, Ch. 285, L. 1959.

- 69-3507. Boat liveries. (a) The owner of a boat livery shall cause to be kept a record of the name and address of the person or persons hiring any vessel which is designated or permitted by him to be operated; the identification number thereof; and the departure date and time, and the expected time of return. The record shall be preserved for at least six (6) months.
- (b) Neither the owner of a boat livery, nor his agent or employee shall permit any motorboat or any vessel designed or permitted by him to be operated as a motorboat or vessel to depart from his premises unless it shall have been provided, either by owner or renter, with the equipment required pursuant to section 69-3505 and any rules and regulations made pursuant thereto.

History: En. Sec. 7, Ch. 285, L. 1959.

- **69-3508. Prohibited operation.** (a) No person shall operate or knowingly permit any person to operate, any motorboat or vessel, or manipulate any water-skis, surfboard, or similar device in a reckless or negligent manner so as to endanger the life, limb, or property of any person.
- (b) No person shall operate, or knowingly permit any person to operate, any motorboat or vessel, or manipulate any water-skis, surfboard, or similar device while intoxicated or under the influence of any narcotic drug, barbiturate or marijuana.
- (c) It shall be unlawful for the owner of any motorboat or vessel, or any person having such in charge or in control, to authorize or knowingly permit the same to be operated by any person who by reason of physical or mental disability is incapable of operating such watercraft under the prevailing circumstances.
- (d) No person shall operate, or knowingly permit any person to operate, any motorboat or vessel at a rate of speed greater than will permit such person, in the exercise of reasonable care, to bring the vessel to a stop within the assured clear distance ahead; provided, however, that nothing in this act is intended to prevent the operator of a vessel actually competing in a regatta which is sanctioned by an appropriate governmental unit from attempting to attain high speeds on a marked racing course.
- (e) No person shall make reckless approach to or passage by a dock, ramp, diving board or float.
- (f) Skiers being pulled by motorboats must have on their person a life preserver, buoyant vest or ring buoy.

History: En. Sec. 8, Ch. 285, L. 1959.

- 69-3509. Right of way. (a) When two vessels are approaching each other "head on," or nearly so (so as to involve risk of collision), each vessel shall bear to the right and pass the other vessel on its left side.
- (b) When vessels approach each other obliquely or at right angles, the vessel approaching on the right side has the right of way.
- (c) One vessel may overtake another on either side but shall grant right of way to the overtaken vessel.

(d) When a sailboat and motorboat are operating as to involve a risk of collision with each other, the motorboat shall yield the right of way to the sailboat in all cases.

History: En. Sec. 9, Ch. 285, L. 1959.

- 69-3510. Restricted areas. (a) No person shall so anchor a vessel or other obstacles for fishing or pleasure purposes, on any body of water over which the state has jurisdiction, in such a position as to obstruct a passageway ordinarily used by other vessels.
- (b) No person shall operate a pleasure vessel within twenty (20) feet of the exterior boundary of a water area which is clearly marked by buoys or some other distinguishing device as a bathing or swimming area.
- (c) Swimming areas shall be marked with yellow and red colored buoys by the owners of such areas.
- (d) No person shall operate or knowingly permit any person to operate a vessel within twenty (20) feet of a person engaged in fishing without permission, or unless unavoidable.

History: En. Sec. 10, Ch. 285, L. 1959.

- 69-3511. Overloading and overpowering. (a) No vessel shall be loaded with passengers or cargo beyond its safe carrying capacity, taking into consideration weather and other normal operating conditions.
- (b) No vessel shall be equipped with any motor or other propulsion machinery beyond its safe power capacity, taking into consideration the type and construction of such watercraft and other existing operating conditions.

History: En. Sec. 11, Ch. 285, L. 1959.

- 69-3512. Collisions, accidents and casualties. (a) It shall be the duty of the operator of a vessel involved in a collision, accident or other casualty, so far as he can do so without serious danger to his own vessel, crew and passengers (if any), to render to other persons affected by the collision, accident or other casualty, such assistance as may be practicable and as may be necessary in order to save them from or minimize any danger caused by the collision, accident or other casualty, and also to give his name, address and identification of his vessel in writing to any person injured and to the owner, or person in control of any property damaged in the collision, accident or other casualty.
- (b) The board shall prepare and distribute to each sheriff's office of this state, a standardized accident report form; any person involved in a collision, accident or other casualty involving a death, personal injury or property damage in excess of one hundred dollars (\$100.00) shall immediately report such collision, accident or other casualty to the sheriff's office of the county in which the collision, accident or easualty occurred and fill out a standardized accident report form.
- (c) It shall be the duty of any sheriff advised of a collision, accident or other casualty reported under this act; to (1) conduct an appropriate investigation of such collision, accident or other casualty and (2) to pre-

pare and submit a report of the results of said investigation, together with the completed standardized accident report forms to the board.

History: En. Sec. 12, Ch. 285, L. 1959.

69-3513. Transmittal of information. In accordance with any request duly made by an authorized official or agency of the United States, any information compiled or otherwise available to the board pursuant to section 69-3512 (b) and (c) shall be transmitted to said official or agency of the United States.

History: En. Sec. 13, Ch. 285, L. 1959.

- 69-3514. Water-skis and surfboards. (a) No person shall operate a vessel on any waters of this state towing a person or persons on water-skis, a surfboard, or similar device, nor shall any person engage in water-skiing, surfboarding, or similar activity at any time between the hours from one hour after sunset to one hour before sunrise; provided, however, that the provisions of this subsection do not apply to a performer engaged in a professional exhibition or a person or persons engaged in a regatta or race authorized under this act.
 - (b) All right of way rules applying to the towing vessel shall apply. History: En. Sec. 14, Ch. 285, L. 1959.
- 69-3515. Owner's civil liability. The owner of a vessel shall be liable for any injury or damage occasioned by the negligent operation of such vessel, whether such negligence consists of a violation of the provisions of the statutes of this state, or neglecting to observe such ordinary care and such operation as the rules of the common law require. The owner shall not be liable, however, unless such vessel is being used with his or her express or implied consent. It shall be presumed that such vessel is being operated with the knowledge and consent of the owner, if at the time of the injury or damage, it is under the control of his or her spouse, father, mother, brother, sister, son, daughter or other immediate member of the owner's family. Nothing contained herein shall be construed to relieve any other person from any liability which he would otherwise have, but nothing contained herein shall be construed to authorize or permit any recovery in excess of injury or damage actually incurred.

History: En. Sec. 15, Ch. 285, L. 1959.

Collateral References

Liability of owner or operator of motorboat for injury or damage. 63 ALR 2d 343.

69-3516. Filing of regulations. A copy of the regulations adopted pursuant to this act, and of any amendments thereto, shall be filed in the office of the board and in the office of the secretary of state. Rules and regulations shall be published by the board in a convenient form and made easily available to all vessel operators.

History: En. Sec. 16, Ch. 285, L. 1959.

69-3517. Enforcement of act. It shall be the duty of the sheriffs of the various counties in state, and game wardens, or any peace officer in the state of Montana to enforce the sections of this law.

History: En. Sec. 17, Ch. 285, L. 1959.

69-3518. Penalty. Violations of any section of this act shall be a misdemeanor and be punishable by fine of not less than ten dollars (\$10.00) or more than five hundred dollars (\$500.00) or by imprisonment up to thirty (30) days, or by both such fine and imprisonment.

History: En. Sec. 18, Ch. 285, L. 1959.

CHAPTER 36

COUNTY AND MUNICIPAL AMBULANCE SERVICE

Section 69-3601. Establishment of service authorized—costs—petition. 69-3602. Methods of operation—rules—fees. Existing service unaffected,

69-3601. Establishment of service authorized—costs—petition. A county, city or town, acting through its governing body, may establish and maintain an ambulance service for such county, city or town, and it may also contract with another county, city or town to establish and maintain a joint ambulance service and to share the costs, such costs to be apportioned according to the benefits to accrue, the proportion to be paid by each to be fixed in advance by joint resolution by the respective governing bodies, if the governing body has received a petition signed by fifty per centum (50%) of the taxpayers who are listed on the last-completed assessment roll.

History: En. Sec. 1, Ch. 238, L. 1961.

- 69-3602. Methods of operation—rules—fees. If a county, city or town establishes or maintains such ambulance service it may, acting through its governing board:
 - (1)Operate the service itself or contract for such service;
- Buy, rent, lease or otherwise contract for vehicles, equipment, facilities, operators or attendants;
- Adopt rules and establish fees or charges for the furnishing of such ambulance service.

History: En. Sec. 2, Ch. 238, L. 1961.

69-3603. Existing service unaffected. The provisions of this act shall in no way affect county, city or town ambulance service in operation at the time of its passage.

History: En. Sec. 3, Ch. 238, L. 1961.







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